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In the Supreme Court of the United States

OCTOBER TERM, 1982

JACQUELINE N. RAU,
Conditional Cross-Petitioner,

v.

SHIRLEY STOVER, et al.,
Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

CONDITIONAL CROSS-PETITION OF JACQUELINE N. RAU

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QUESTIONS PRESENTED

1. Do the unethical *ex parte* communications and the conduct of Judge Wright in this case disqualify him pursuant to 28 U.S.C. § 455(a)?
2. Can class members be fairly and adequately represented in a class action with no class representative?
3. Can class counsel fairly and adequately represent a class member with whom they have a conflict of interest?
4. Should a district court certify a Rule 23(b)(1)(B) class based on plaintiffs' damages as alleged in their complaints?
5. Should a district court certify cases arising out of a mass tort as a mandatory class action?
6. Must a district court which certifies a mandatory class action that denies class members adequate representation permit those class members to opt out?

LIST OF PARTIES

The parties to the appeal of Jacqueline N. Rau in the Eighth Circuit, No. 82-1207, were: Jacqueline N. Rau and Shirley Stover and all other putative class members similarly situated. The parties to the Petition for Mandamus of Melanie Hanson Johnson and Gerard Stanley Johnson, *et al.* in the Eighth Circuit (No. 82-1181) were: Melanie Hanson Johnson, Gerard Stanley Johnson and all other state court plaintiffs similarly situated; Shirley Stover and all other putative class members similarly situated; and the Honorable Scott O. Wright, United States District Court Judge for the Western District of Missouri.

Crown Center Redevelopment Corp., Hallmark Cards, Inc., Hyatt Corp. and Hyatt Hotels Corp., and the Plaintiffs' Liaison Committee participated in the Eighth Circuit proceeding as *amici curiae*.

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CONDITIONAL CROSS-PETITION OF JACQUELINE N. RAU

If this Court grants the petition of Shirley Stover, *et al.*, No. 82-217, the cross-petitioner, Jacqueline N. Rau, respectfully requests that her cross-petition for a writ of certiorari be granted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reproduced as Appendix A and published at 680 F.2d 1175. The opinion of the United States District Court for the Western District of Missouri is reproduced as Appendix D and published at 93 F.R.D. 415.

JURISDICTION

The Eighth Circuit entered its judgment on June 7, 1982, and denied rehearing *en banc* on July 9, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

1. 28 U.S.C. § 455(a) concerning disqualification of judges provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

2. 28 U.S.C. § 2072 authorizing promulgation of the Rules of Civil Procedure is reproduced as Appendix E.

3. Fed. R. Civ. P. 23 concerning class actions is reproduced as Appendix F.

4. American Bar Association Code of Judicial Conduct, Canon 2A, adopted by the Judicial Conference of the United States, 69 F.R.D. 273 (1975), provides:

> A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

5. American Bar Association Code of Judicial Conduct, Canon 3A(4), adopted by the Judicial Conference of the United States, 69 F.R.D. 273 (1975), provides:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. . . .

STATEMENT OF THE CASE

On July 17, 1981, two skywalks spanning the lobby of the Hyatt Regency Hotel in Kansas City, Missouri, collapsed killing 114 persons and injuring approximately 220 others. App. A, 2a; *In re Federal Skywalk Cases*, 680

F.2d 1175, 1177 (8th Cir. 1982). Among those killed was Dr. Jerold Rau, one of the leading dermatologists in the Kansas City area. His wife, Jacqueline N. Rau, respondent and conditional cross-petitioner in this Court, was injured.

Ms. Rau's State Court Cases, And Her Efforts To Settle Before The District Court's Injunction And Class Certification Order.

Ms. Rau filed one suit for the wrongful death of Dr. Rau and another suit for her own injuries in the Circuit Court for Jackson County, Missouri. In the death case she seeks actual damages and damages for "aggravating circumstances" under Mo. Rev. Stat. § 537.090. In her personal injury case she seeks actual and punitive damages. Ms. Rau's lead counsel do not represent any other victim of the skywalks collapse.

Ms. Rau's cases are among the 187 cases involving approximately 200 victims of the skywalks collapse filed in the state court. Judge Timothy O'Leary was assigned to handle all of the state court skywalk cases. App. A, 3a; *Federal Skywalk Cases*, 680 F.2d at 1177. He appointed a liaison committee made up of representatives of counsel for plaintiffs and defendants. *Id.* In the fall of 1981, pursuant to a schedule adopted by Judge O'Leary, comprehensive written interrogatories were answered by both plaintiffs and defendants. *Id.* Plaintiffs and defendants produced 300,000 pages of documents which are kept in a depository established by all litigants. *Id.* The liaison committee also negotiated a procedure with interested parties which enabled the National Bureau of Standards to test the skywalks debris and to obtain results which are admissible in evidence. App. A, 3a; 680 F.2d at 1177-78.

At Judge O'Leary's urging, defendant committed $151,000,000 to settle claims. J. App. Ex. 12, 53.[1] By January 25, 1982, 123 claims had been settled for approximately $18,500,000. App. A, 3a; 680 F.2d at 1177 n.5.

Ms. Rau made a detailed written settlement demand to defendants. Counsel for Ms. Rau and defendants met in December, 1981. The negotiations were moving forward until the district court entered its order on January 25, 1982. Defense counsel thereupon terminated the negotiations. App. G.

The Federal Cases And The Motion For Class Certification.

Eighteen claimants filed suit in the district court as of January, 1982, on the basis of diversity of citizenship. App. A, 3a; 680 F.2d at 1177 n.5. Those cases were assigned to Judge Scott O. Wright. App. A, 3a; 680 F.2d at 1177. Only five of those actions now remain. A sixth was filed on September 23, 1982.[2]

In September, 1981, Judge Wright appointed a liaison committee to coordinate discovery and trial. App. A, 3a; 680 F.2d at 1177. The plaintiffs' liaison committee was incorporated into the state court committee appointed by Judge O'Leary. *Id.* n.6. Discovery proceeded pursuant to several pre-trial conferences and orders entered by Judge Wright. App. A, 3a; 680 F.2d at 1177. Those orders tracked the orders entered by Judge O'Leary. The written interrogatories and requests for production of

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[1] "J. App." is the appendix filed by Melanie Hanson Johnson and Gerard Stanley Johnson in the United States Court of Appeals for the Eighth Circuit.

[2] The new plaintiffs are Deborah T. and James W. Jackson; No. 82-0797-CV-W-9. They are citizens of Utah. No defendant is a citizen of Utah. Ms. James sues for emotional distress and minor personal injury. Mr. James sues for loss of consortium.

documents used by both plaintiffs and defendants in the federal cases were the same as those which had been used in the state cases.

On September 1, 1981, a federal court plaintiff with minor injuries, Molly Riley, filed an amended complaint in which she sought certification of a class action. App. D, 44a; *In Re Federal Skywalk Cases*, 93 F.R.D. 415, 419 (W.D. Mo. 1982). In other to achieve diversity of citizenship, Ms. Riley, who is a citizen of Kansas, did not sue two Kansas firms involved in the case. *Id.* On October 27, 1981 she filed a motion for class certification and asked to be named as the class representative. App. A, 4a; 680 F.2d at 1178.

Ms. Riley's lead counsel, Irving Younger and Paul Wolff, practice in Washington, D.C. They asked to be named class counsel. *Id.* None of Ms. Riley's counsel were on the federal or state court appointed plaintiffs' attorneys liaison committees. J. App. Ex. 5, 2.

Respondents Melanie Hanson Johnson and Gerard Stanley Johnson and other federal and state court plaintiffs challenged Ms. Riley's qualifications and those of her attorneys to represent the class and the need for and desirability of class action treatment.[3] App. A, 5a; 680 F.2d at 1178. They also objected to a class under Rule 23(b)(1)(B) because plaintiffs could not opt out of such a class. J. App. Ex. 2, 2; Ex. 7, 6.

On December 10, 1981, the district court conducted a hearing on class certification. J. App. Ex. 35. Counsel for objectors filed one hundred seventy-five affidavits of individual plaintiffs from both state and federal court opposing any form of class action. J. App. Ex. 3, 1. The only federal court plaintiff who expressly supported class certification

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[3] Counsel for the objectors include Patrick McLarney and David Morris, local counsel for Ms. Rau. J. App. Ex. 2, 4.

without reservation was Ms. Riley. J. App. Ex. 1, Ex. E, 1; J. App. Ex. 35. All defendants opposed certification of a class at that time. J. App. Ex. 35. The defendants disclosed that they had a total of $333,000,000 in insurance coverage. One of the counsel for the objectors estimated that the actual value of all compensatory damages claims arising from the skywalks collapse whether filed in court or not was $150,000,000. J. App. Ex. 11, 33. Hallmark Corporation and Hyatt Coproration disclosed *in camera* their approximate net worths. App. D, 45a; 93 F.R.D. at 419. No evidence was offered proving that the actual value of the victims' claims exceeded the defendants' insuarnce coverage and assets.

Judge Wright's Ex Parte Solicitation Of A Class Representative, And His Injunction And Class Certification Order.

Judge Wright realized that Ms. Riley could not represent the class because she was not of diverse citizenship from all appropriate defendants.[4] Although no other plaintiff had requested a class action, Judge Wright decided, *sua sponte*, to certify a class. He reviewed the federal complaints to see if the citizenship of any other plaintiffs was diverse from all appropriate defendants and selected plaintiffs Stover, Johnson, Vrabel, Grigsby and Abernathy. He then placed two telephone calls to Ms. Stover's attorney, Robert L. Collins of Houston, Texas. He told Mr. Collins that he intended to certify a class action on January 15, 1982. He asked whether Ms. Stover

[4] The statements in the next paragraph are based in part on Judge Wright's admissions in his order of January 25, 1982, and in part on statements made by attorney Robert L. Collins to plaintiffs' attorneys. App. D, 47a-48a; 93 F.R.D. at 425-28; J. App. Exs. 6, 13-14.

would serve as class representative, and said that if she agreed he would appoint Mr. Collins as assistant class counsel to Ms. Riley's attorney, Irving Younger. They discussed other aspects of the class action, and agreed to speak again after Mr. Collins consulted with Ms. Stover. Mr. Collins and Judge Wright even agreed to meet privately in Kansas City on January 18, 1982.[5]

On January 19, 1982, counsel for the objecting plaintiffs moved pursuant to 28 U.S.C. § 455(a) to disqualify Judge Wright. They appended affidavits concerning the judge's *ex parte* calls to Mr. Collins. J. App. Ex. 15, Exs. A-B.

On January 25, 1982, Judge Wright entered the order from which Ms. Rau appealed. App. D; *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo. 1982). He (1) denied Ms. Riley's motion for class certification; (2) certified a class action under Rule 23(b)(1)(A) on the issues of liability for compensatory and punitive damages; (3) certified a class action under Rule 23(b)(1)(B) on the issues of liability for punitive damages and the amount of punitive damages; (4) selected plaintiffs Stover, Vrabel, Grigsby and Abernathy as class representatives;[6] (5) selected Ms. Riley's counsel as lead class counsel, and counsel for the class representatives as assistant class counsel; (6) defined the class members as "business invitees of the [Hyatt Regency] Hotel who suffered physi-

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[5] Mr. Collins thereupon called defense counsel and attempted to settle Ms. Stover's case. App. A, 6a; 680 F.2d at 1179. During these conversations he revealed the calls from Judge Wright, and urged defendants to settle with Ms. Stover in order to avoid certification of a class. J. App. Ex. 14, 2-3; Ex. 15, 3.

[6] Judge Wright deleted plaintiffs Grigsby, Vrabel and Abernathy as class representatives on February 1, 1982, leaving Ms. Stover as the sole class representative. J. App. Exs. 27-28.

cal, mental, or property damage as the result of the collapse of the two skywalks;" (7) denied the disqualification motion; (8) prohibited class members from settling or prosecuting their state court claims for punitive damages and resolved other issues not relevant to the petition for a writ of certiorari.[7]

The reasons given by Judge Wright for certifying a class were economy and efficiency in handling liability issues in a single trial, fairness to all claimants in light of the risk that defendants would have inadequate funds to pay all punitive damage claims,[8] uncertainty under Missouri law about whether a defendant can be held liable for more than one award of punitive damages for the same conduct, and resolution of possible conflicts of interest on the part of counsel who represent several claimants. App. D, 56a-57a; 93 F.R.D. at 419, 424-25.

Events Between The District Court's Order And The Decision Of The Eighth Circuit.

On January 27, 1982, Judge Wright ordered that class members other than the named class representatives could not file pleadings, and that their concerns "should be directed to class counsel." J. App. Ex. 20. On January 29, 1982 Judge Wright ordered that no matter could be presented to the court which concerned a class member unless it was presented by the designated class counsel, except matters pertaining to completed settlements. He directed

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[7] The terms and impropriety of Judge Wright's prohibition against settlements are discussed in full in Ms. Rau's brief in opposition to the petition of Shirley Stover, *et al.* and will not be repeated in this petition.

[8] Judge Wright found no evidence that funds available from defendants were inadequate to pay compensatory damage claims. He concluded only that "there is a question as to whether sufficient funds are available to pay awards of punitive damages." App. D, 56a; 93 F.R.D. at 424.

the clerk of court to reject any matters not filed by class counsel or defendants' counsel.[9] J. App. Ex. 26.

On January 29, 1982, Judge Wright also quashed notices for depositions of Ms. Stover and Mr. Collins. Counsel for the objecting plaintiffs intended to depose Ms. Stover and Mr. Collins to learn whether they satisfied Rule 23 requirements. J. App. Ex. 22, 1; Ex. 23, 1; Ex. 24, 1-2; Ex. 26.

On February 2, 1982, counsel for several major defendants filed a notice that they would recommence settlement negotiations, but would "only settle such claims in return for a full release of all claims, including a waiver of any claim for punitive damages." J. App. Ex. 33, 1.

On February 10, 1982, class counsel filed a motion *in limine*, in response to the defendants' notice of February 2, 1982, in which they stated, J. App. Ex. 39, 2-3:

> The short answer to the defendants' Notice is that this Court's Order and Memorandum certifying the class forbids individual settlements of claims for punitive damages . . . . As the Court emphasized, settlements of punitive damage claims must be prohibited . . . .

Moreover, as one reason for their emphatic support of the district court's prohibition on settlements, class coun-

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[9] On February 4, 1982, counsel for Ms. Rau attempted to file her motion to vacate the orders of January 25 and 29, 1982, to disqualify designated counsel because of conflicts of interest, to dismiss for want of subject matter jurisdiction, to decertify the class, to exclude Ms. Rau from the class, to disqualify the class representatives, to disqualify Judge Wright, for leave to take discovery concerning Judge Wright's *ex parte* communications with counsel and comments to the press, and to stay pending review by the Eighth Circuit. The Clerk of the District Court refused to accept or file the motion because it was not signed by class counsel. J. App. Ex. 34, 2.

sel explained that settlements might diminish their attorneys fees.[10]

Class counsel did not consult with Ms. Rau's attorneys before filing their motion *in limine*. App. G.

After class certification, class counsel took only ten depositions. They allowed no participation in discovery by the plaintiffs' liaison committee or the approximately 90 plaintiffs with cases pending in state court. Instead, class counsel commenced settlement negotiations with defendants, negotiations which reportedly included a fee of 2.4 million

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[10] "Another troubling consequence of defendants' scheme is its unfairness (perhaps intended) to counsel for the class. The proceedings between now and mid-August may well put it beyond doubt that the day of trial will, for one or more defendants, be a day of reckoning indeed. Defendants therefore may raise the level of their offers in order to accelerate the pace of settlement, hoping that by August 16 something close to 100% of the class settles. Assume that defendants succeed and that of August 16, every claim has been settled save that of Shirley Stover, the class representative. If defendants have their way, the verdict in Mrs. Stover's trial for punitive damages will be adversely affected by the settlements with all other class members. The jury's verdict after the evidence of settlement is presented, will be, let us say, $1 million, and the verdict the jury would have rendered had there been no settlements, $500 million. Many of the settlements, in fact, most, if not all, of those occurring shortly prior to trial, will have been made possible by the skill and energy of counsel for the class in prosecuting an action that induced the defendants to agree to settlements. Yet, these efforts will have also brought about a diminution of the fund secured for the non-settling class members. How then is counsel's compensation to be determined? And who is to pay it? The settling class members or those who go to trial? Or both? And in what proportion? If the recoveries generated, in whole or part, by class counsel, are deemed to be anything more than the jury verdict, what is the source of the money to pay whatever the Court allows counsel for the class? We do not now have answers. We merely identify the questions to emphasize the imprudence of defendants' proposal." J. App. Ex. 39, 14 n.7.

dollars plus expenses. *In re Skywalk Cases*, No. CV81-15244-MCF (Cir. Ct. Jackson Cty., Mo. June 3, 1982).

On February 8, 1982, Melanie Hanson Johnson and Gerard Stanley Johnson filed a Petition for a Writ of Mandamus with the Eighth Circuit. On February 9, 1982, Ms. Rau filed her notice of appeal. The notice was based upon 28 U.S.C. § 1292(a)(1), which authorizes appeals from interlocutory orders granting injunctions.

No settlements were negotiated between January 25, 1982, the date of the district court's order, and June 7, 1982, the date of the Eighth Circuit's decision. Affidavit of Michael Waldeck, August 23, 1982, p. 1. Defense counsel declined to even discuss settlement with Ms. Rau's lawyers. App. G.

The Eighth Circuit Opinion, And The Resumption Of Settlements.

On June 7, 1982, the United States Court of Appeals for the Eighth Circuit vacated the district court's order. App. A, 19a; *In re Federal Skywalk Cases*, 680 F.2d 1175, 1184 (8th Cir. 1982). The majority held, and Judge Heaney agreed in dissent, that the district court granted an injunction appealable under 28 U.S.C. § 1292(a)(1). App. A, 9a, 20a, 35a-36a n.16; 680 F.2d at 1180, 1185, 1191-92 n.16. The majority held that the district court's injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283. App. A, 14a-17a; 680 F.2d at 1182-83. The majority also held that Judge Wright did not abuse his discretion by refusing to disqualify himself under 28 U.S.C. § 455(a). *Id.* at 1183-84. The majority did not rule on the merits of class certification.

On September 9, 1982, the state court consolidated its skywalk cases for trial. Trial in state court is set for March 14, 1983. *In re Skywalk Cases*, No. CV 81-15244-MCF (Cir. Ct. Jackson Cty., Mo. September 9, 1982).

After the Eighth Circuit mandate became final, petitioners moved for certification of a new mandatory class action

and, alternatively, an opt-out class action under Fed.R.Civ. P. 23(b)(3). *In re Federal Skywalk Cases*, No. 81-0945-A-CV-W-5, slip op. at 4 (W.D. Mo. Sept. 17, 1982). On September 17, 1982, the district court denied petitioners' motion, consolidated the remaining federal skywalk cases for discovery and trial and set the trial for January 10, 1983. *Id.* at 5.6. In its opinion the district court stated, *Id.* at 4-5:

> A hearing was held on September 13, 1982 to determine the propriety of a voluntary class action. From the arguments presented at that hearing, it became apparent that no person, whose citizenship was wholly diverse from all defendants, was willing to represent the Class. The Court was informed that the prior representative, Mrs. Shirley Stover and her children, had settled their cases for a reported sum in excess of 10 million dollars just prior to the hearing. Discovery is presently being conducted for the purpose of ascertaining the propriety of the alleged settlement figure. [footnotes omitted.]

On September 30, 1982, the district court conducted a hearing on the propriety of Shirley Stover's settlement. The court found the terms to be proper but refused to approve the settlement unless defendants agreed not to raise it in this Court. Transcript of hearing before the Honorable Scott O. Wright on September 30, 1982.[10a]

Since the Eighth Circuit's decision, the plaintiffs' and defendants' liaison committees have resumed the discovery process. As of October 1, 1982, the federal and state plaintiffs have deposed 32 witnesses. Moreover, as of August 5, 1982, 47 additional cases have been settled for approximately $5,500,000. Affidavit of Michael Waldeck, August 23, 1982, p. 1.

On August 18, 1982, counsel for Ms. Rau met with representatives of defendants to resume settlement negotiations. Since that meeting, counsel for Ms. Rau and defendants have exchanged correspondence in an ongoing effort to settle her case. App. G.

[10a] The page citations to this transcript is unavailable as of October 7, 1982.

REASONS FOR GRANTING THE CROSS-PETITION

This conditional cross-petition raises the issue of Judge Wright's disqualification, which the Eighth Circuit considered and denied, and issues involving class certification, which the Eighth Circuit did not reach because it vacated the district court's order on alternative grounds. These issues might not be sufficiently important to warrant an independent petition for certiorari. However, if this Court decides to grant the petition of Shirley Stover, *et al.*, No. 82-217, this Court should review the entire case.

Disqualification Under 28 U.S.C. § 455(a). Judge Wright procured a class representative who had expressed no interest in the class by initiating *ex parte* telephone calls to her attorney, whom he later appointed as assistant class counsel, in which he discussed the merits of pending motions. He appointed as lead class counsel attorneys who do not represent a class representative and who have a direct and serious conflict of interest with class members with substantial actual damage claims such as Ms. Rau. He failed to disclose to other plaintiffs' counsel his *ex parte* telephone calls until forced to do so by their motion to disqualify. He conditioned his approval of the class representative's settlement on defendants' promise to withhold the knowledge of settlement from this Court. Judge Wright also ordered the Clerk not to accept any class members' motions, except motions filed by lead counsel or assistant class counsel. For these and other reasons, Judge Wright has shown his bias, and should be disqualified under 28 U.S.C. § 455(a).

Impropriety Of Class Certification. The mandatory class certified by the district court is improper for five reasons.

First, there is no remaining federal court plaintiff with diversity of citizenship and an interest adequate to fairly represent all class members. Therefore, the putative class members cannot be adequately represented by the class action as required by Fed. R. Civ. P. 23(a)(4).

Second, class counsel advocate enjoining individual class members from settli[illegible] heir state court claims for punitive damages on the ground, among others, that such settlements may diminish their attorneys' fees. No class counsel represents a class representative. Consequently, class counsel cannot adequately or fairly represent class members such as Ms. Rau as required by Fed. R. Civ. P. 23(a)(4).

Third, the evidence was insufficient to support the district court's finding that there was a "limited fund" of defendants' resources. The district court's order certifying a class on this basis was an abuse of discretion.

Fourth, class actions should not be certified in cases arising out of mass torts, such as the skywalks collapse, because of each litigant's vital interest in his or her own personal injury or wrongful death action, and trial attorney. The district court's class certification order to the contrary is an abuse of discretion.

Fifth, Ms. Rau's interests are not fairly and adequately protected by any class representative or class counsel and, therefore, she must be permitted to opt out of any class which may be certified. The district court's order to the contrary violates her right to due process of law and 28 U.S.C. § 2072.

ARGUMENT

I.

THE EIGHTH CIRCUIT ERRONEOUSLY SANCTIONED JUDGE WRIGHT'S SOLICITATION OF CLASS REPRESENTATIVES AND FRUSTRATION OF MS. RAU'S EFFORTS TO BE HEARD.

The purpose of 28 U.S.C. § 455(a) is to prevent the appearance of partiality on the part of a presiding judge. *United States* v. *Poludniak*, 657 F.2d 948, 954 (8th Cir. 1981), *cert. denied sub nom., Weigand* v. *United States*, 102 S.Ct. 1431 (1982). "'[D]isqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality.'" *Id.* at 954. Judge Wright's conduct in this case must cause any reasonable person to question his impartiality. The Eighth Circuit erred as a matter of law by employing the wrong standard to evaluate Judge Wright's conduct, and thereby sanctioned conduct so far departed from the usual course of judicial proceedings as to require this Court to exercise its power of supervision.

Judge Wright's partisan behavior apparently began when he "commenced a survey" of court records to determine which plaintiffs who filed suit in the federal court could serve as class representatives, although none but Ms. Riley expressed an interest. App. D, 59a; 93 F.R.D. at 425. Upon completion of his survey, the Judge undertook a secret *ex parte* inquiry into the attitudes of the potential class representatives he had selected. He started by calling Mr. Collins, soliciting Ms. Stover's participation as a class representative and discussing the merits of the case and his forthcoming ruling on the pending

motion for class certification. Judge Wright and Mr. Collins even planned a private meeting to further discuss the matter. Judge Wright gave no notice to counsel for other parties of his *ex parte* calls so that they could protect the rights of their clients.

Judge Wright named as class representatives four plaintiffs, none of whom had moved for class certification, without permitting or conducting any inquiry into the adequacy of their representation of the class.[11] He named as lead counsel the attorney who represents Ms. Riley. All appointed class counsel are burdened with ineradicable conflicts of interest, and have already demonstrated that they cannot and will not fairly represent the class. *See,* 20-22 below.

Judge Wright attempted to insulate the class he certified from attack by unnamed class members. In his order of January 29, 1982, he prohibited individual unnamed class members from conducting the prosecution of "any claim" and from presenting "any matters that are not being filed by counsel for the class or counsel for defendants" except for "matters which pertain to the completed settlement of an unnamed class member's claim." Consequently, the Clerk of the District Court refused to file Ms. Rau's motion to vacate the class action orders and to decertify the class, because her motion was not signed by designated class counsel. Judge Wright continues to attempt to isolate his order from attack. On September 30, 1982 he conditioned his approval of Ms. Stover's settlement, which he concedes is proper, on the promise of defense counsel not to disclose the settlement to this Court.

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[11] Three of the four plaintiffs were later dismissed as class representatives, leaving only Mr. Collins' client, Ms. Stover.

By this course of conduct, Judge Wright has abandoned his role as impartial arbiter, and has become an advocate for the position of those few plaintiffs who favor class certification and whose interests lie in having the punitive damage claims take priority over compensatory damage claims. He has unilaterally manipulated events and forced a class action after the only movant for certification, Ms. Riley, was found wanting. Now he seems bent on concealing the lack of an adequate class representative from this Court. In doing so, he has engaged in unethical conduct violating Canons 2A and 3A(4) of the Code of Judicial Conduct, and has run roughshod over the legitimate objections of persons, such as Ms. Rau, who are substantially affected by and opposed to what he has done.

Both federal and state courts have found instances of judicial conduct far less egregious than that of Judge Wright to be sufficient justification for disqualification. For example, in *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110 (7th Cir. 1977), the trial judge made an *ex parte* inquiry to determine his attorney-brother's role in a pending case. In ordering disqualification through writ of mandamus, the Seventh Circuit held that "[w]hile it is understandable why the judge may have felt his brother could present the most accurate evidence as to his role in the pending litigation, the judge's inquiry creates an impression of private consultation and appearance of partiality . . . ." *Id.* at 116.

In *Trustees of Central States Southeast and Southwest Areas, Pension Fund* v. *Indico Corp.*, 401 So.2d 904 (Fla. Dist. Ct. App. 1981), the court held that a violation of Canon 3(A)(4) occurred if the trial judge spoke *ex parte* to a former judge who handled a prior aspect of the case but who had since left the bench and joined the firm representing one of the parties. The court held that on remand the trial judge should make a full disclosure, and

if it appeared that the conversation took place the judge should disqualify himself. 401 So.2d at 907. *See also, In re Dekle*, 308 So.2d 5, 11-12 (Fla. 1975) (per curiam); *In re Boyd*, 308 So.2d 13, 21-22 (Fla. 1975) (per curiam); *Matter of Bonin*, 375 Mass. 680, 378 N.E.2d 669, 684-85 (1978).

A motion for disqualification takes precedence over any matter pending in the case in which the motion is made. *See, Marty's Floor Covering Co., Inc.* v. *GAF Corp.*, 604 F.2d 266, 268 (4th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980); *Stringer* v. *United States*, 233 F.2d 947, 948 (9th Cir. 1956). Consequently, Judge Wright's determination of all other issues raised simultaneously with the disqualification question on January 25, 1982 or afterwards were improper and should have been vacated and remanded by the Eighth Circuit for consideration by a new district court judge.

The Eighth Circuit did not condone Judge Wright's *ex parte* communications with Mr. Collins. 680 F.2d at 1184. Yet, because Judge Wright developed something of a record before issuing his order, and because the order was carefully reasoned, the majority concluded that Judge Wright "certified the class based solely on his judgment that such action would best serve the interests of all parties involved." *Id.*

The Eighth Circuit erred. The majority ignored the standard of review for a ruling on disqualification. They acknowledged that the standard was whether the district court abused its discretion when determining whether its impartiality might reasonably be questioned. App. A, 17a; 680 F.2d at 1183. However, they concluded, in essence, that Judge Wright was actually impartial. App. A, 17a; 680 F.2d at 1184. This error alone requires that their decision on the disqualification of Judge Wright be vacated.

Moreover, the record of Judge Wright's objectionable conduct, which now includes his most recent effort to conceal the Stover settlement from this Court, is sufficient to support this Court's reversal of the Eighth Circuit's opinion on disqualification. The conduct of Judge Wright is injudicious in the extreme. It reflects the appearance of bias and partiality which Section 455(a) is designed to avoid and so demeans the integrity of the federal judiciary as to justify this Court's exercise of supervisory power.

II.

THE MANDATORY CLASS ACTION CERTIFIED BY THE DISTRICT COURT DENIES CLASS MEMBERS DUE PROCESS OF LAW AND VIOLATES RULE 23.[12]

A. Ms. Rau Cannot Be Fairly And Adequately Represented In The Mandatory Class Action As Required By Due Process Of Law And Rule 23(a)(4).

The class representative and class counsel must fairly and adequately protect Ms. Rau's interests, as an absent class member, in order to afford her due process of law. *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940). This fundamental notion of fairness is the basis for the requirement of Fed.R.Civ.P. 23(a)(4). *See*, 7 C. Wright and A. Miller, *Federal Practice and Procedures: Civil*, §1765, 617 (1972). The mandatory class certified by Judge Wright and the class counsel he appointed do not afford Ms. Rau due process of law.

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[12] These errors were raised by Ms. Rau in the district court and on appeal. The district court refused to permit Ms. Rau to file her motions. J. App. Ex. 34. The Eighth Circuit vacated the district court's class certification order on alternative grounds and did not consider any of these errors. Ms. Rau raises these errors by the district court as alternative grounds supporting the decision of the Eighth Circuit. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977).

1. No Class member fairly and adequately represents Ms. Rau.

Shirley Stover, the class representative at the time of the Eighth Circuit's decision, has settled her case. As of September 17, 1982, no person whose citizenship is wholly diverse from all defendants, was willing to represent the class.[13]

The only federal court case out of the six still pending in which the plaintiffs' citizenship is wholly diverse from all defendants is that of Deborah T. and James W. Jackson, Civil Action No. 82-0797-CV-W-9, which was filed on Thursday, September 23, 1982. Mrs. Jackson suffered emotional distress and minor injuries from flying glass. Mr. Jackson sues for loss of consortium. Mr. and Mrs. Jackson do not share Ms. Rau's primary interest in compensatory damages for wrongful death as opposed to punitive damages.[14]

In short, there is no adequate representative for the class certified by the district court with the diversity of citizenship necessary to preserve subject matter jurisdiction under this Court's decision in *Snyder* v. *Harris*, 394 U.S. 332 (1969).

2. Class counsel cannot fairly and adequately represent Ms. Rau.

Class counsel have demonstrated their inability to fairly and adequately represent Ms. Rau through their

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[13] Consequently, even the district court declined to certify an opt-out class in this case.

[14] The Jacksons have moved for reconsideration of the district court's order denying certification of a Rule 23(b)(3) class. They have not indicated an interest in representing the mandatory class.

conflict of interest. On February 10, 1982, they filed a motion insisting that the district court prohibit individual class members from settling their state court claims for punitive damages in direct contradiction to the best interests and wishes of Ms. Rau.

Class counsels' conflict of interest stems from the fundamentally divergent interests of class members which make certification of a class action improper in the first place. Ms. Rau has an extremely large and compelling claim for compensatory damages arising out of the death of her husband, Dr. Jerold Rau. In stark contrast, lead class counsels' client, Molly Riley, suffered virtually no injury, and her chief claim and concern is for punitive damages. This situation creates an irremediable conflict of interest for class counsel.

This Court in *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 331 (1980) identified the potential conflict of interest presented by analogous circumstances, involving employees and applicants for employment, with each group competing for all or some of the same benefits:

> We note . . . that the adequate-representation requirement [of Rule 23(a)(4)] is typically construed to *foreclose* the class action where there is a conflict of interest between the named plaintiff and the members of the putative class. In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. *Under Rule 23, the same plaintiff could not represent these classes.* (Emphasis supplied.)

In *Sullivan* v. *Chase Investment Services of Boston, Inc.*, 79 F.R.D. 246, 258 (N.D. Cal. 1978), the court agreed to certify a class of plaintiffs in a common-law fraud action only on the condition that the class counsel withdraw

as counsel for different plaintiffs in a securities fraud case pending against the same defendant in another jurisdiction. The court explained that the assets and insurance of the defendant might prove insufficient to satisfy its total liability to all plaintiffs, leaving the interests of the class in obvious conflict with those of counsel's other client. *Id.* at 258. Since "[t]he responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel," the class action could not proceed until counsel had withdrawn from the other case. *Id.*

The real motive which spurs class counsel on is revealed in footnote 7 on page 14 of their February 10, 1982 motion—*attorneys' fees.* The class attorneys oppose settlements of punitive damage claims because those settlements may jeopardize the amount of their anticipated fee award. But what of their duty of undivided loyalty to all members of the class? And what of the public policy favoring settlements? This conduct shows that the interests of all of their clients are not uppermost in their scale of values, and that they are incapable of properly and adequately representing the best interests of all members of the plaintiff class.

Ms. Rau does not need a class to protect her interests. Ms. Rau needs to be protected from class counsel whose announced intentions are selfish and aligned with those plaintiffs whose actual damages are insignificant and are therefore, contrary to Ms. Rau's interests.

B. The District Court's Order Violates Rule 23(b)(1)(B).

The district court certified a mandatory class to assure a fair division of punitive damages among all plaintiffs

because of a risk that the assets of liable defendants might be inadequate to satisfy all judgments—the "limited fund" theory—and because of the uncertainty of Missouri law on whether multiple punitive damage awards may be recovered from the same defendant for the same course of conduct.[15] Neither of these reasons is applicable to this case. The district court abused its discretion by certifying a class for these reasons.

The district court's finding of a limited fund was based on the total compensatory and punitive damages claimed in the *ad damnum* clauses of all lawsuits filed as of the date of class certification. App. D, 45a; 93 F.R.D. at 419. There was no evidence that the actual value of plaintiffs claims exceeded the assets of all defendants, including the assets of Hyatt Hotels Corporation and Hallmark Cards, and their $333,000,000 in insurance coverage.[16]

The mere risk of a limited fund based on *ad damnum* clauses is not a sufficient justification to certify a mandatory class. *In re Agent Orange Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980); *Pruitt* v. *Allied Chemical Corp.*, 85 F.R.D. 100 (E.D. Va. 1980); *Payton*

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[15] It also explained that a mandatory class would indirectly resolve possible conflicts of interest on the part of counsel who represent several claimants. App. D, 57a; 93 F.R.D. at 425. This factor is irrelevant to the provisions of Rule 23(b)(1)(B). Moreover, Ms. Rau's lead counsel do not represent any other victims of the skywalks collapse.

[16] On the contrary, as of September 30, 1982 defendants reportedly settled 190 of the 334 lawsuits and other claims for approximately $29,000,000. New York Times, Oct. 1, 1982 at 45, col. 2. Moreover, under Missouri law, liability insurance is available to pay punitive damage judgments rendered against a principal, such as Hyatt or Hallmark, for the negligent acts of its agents. *Ohio Casualty Ins. Co.* v. *Welfare Finance Co.*, 75 F.2d 58, 59-60 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935).

v. *Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979); *George* v. *United Savings & Loan Association*, 63 F.R.D. 631 (N.D. Ga. 1974). Other courts faced with this issue have required proof that the actual value of plaintiffs claims exceed the resources available to pay them. *In re: Northern District of California, Dalkon Shield IUD Products Liability Litigation*, Nos. 81-4648 to 81-4656, slip op. 6-8 (9th Cir. June 18, 1982); *Coburn* v. *4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977), *petition for mandamus denied sub nom., Union Light, Heat & Power Co.* v. *United States District Court*, 588 F.2d 543 (6th Cir.), *cert. denied*, 443 U.S. 913 (1979).

The proponents of the class have simply not established that the actual value of plaintiffs claims is likely to exceed defendants' ability to pay. The district court's finding to the contrary was an abuse of discretion.

The district court also found Missouri law to be uncertain on the issue of whether a single defendant can be held liable for more than one award of punitive damages. Missouri law is clear on this issue. The Missouri Court of Appeals has rejected the argument that multiple punitive damage awards are inappropriate for design defects, and has held that remittitur is available to protect defendants in that situation. *Rinker* v. *Ford Motor Company*, 567 S.W.2d 655, 668 (Mo. App., D.K.C. 1978). *Rinker* is binding on federal courts applying Missouri law.

In light of the *Rinker* decision, the district court's rationale concerning a single award of punitive damages is erroneous as a matter of law. Together with the district court's insufficient factual findings on the "limited fund," the district court's error justifies the Eighth Circuit's decision vacating the class certification order.

III.

CASES ARISING OUT OF MASS TORTS SHOULD NOT BE CERTIFIED AS MANDATORY CLASS ACTIONS.

Unlike many class actions where claims of the unnamed class members are at most of peripheral concern to them, or so minor as to go totally unprosecuted unless aggregated in a class action, the wrongful death and personal injury claims of Ms. Rau and many other class member plaintiffs are the most serious and important of claims. The number of individual actions brought in state and federal court arising out of this tragedy and the vocal opposition of 175 plaintiffs to any form of class action, is evidence that the claims vitally affect the lives of a great many claimants. This is not a situation where the scarcity of individually instituted suits demonstrates a lack of interest in the individual prosecution of cases by potential class members. *Daye* v. *Commonwealth of Pennsylvania*, 344 F.Supp. 1337, 1343 (E.D. Pa. 1972), *aff'd*, 483 F.2d 294 (3d Cir. 1973); *Cf., Bentkowski* v. *Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401, 404-05 (E.D. Pa. 1976).

Protection of the claimants' vital interests in the individual handling of their claims has been held to be a proper ground for denying class certification of a mass tort. *Causey* v. *Pan American World Airways, Inc.*, 66 F.R.D. 392, 399 (E.D. Va. 1975); *Hobbs* v. *Northeast Airlines, Inc.*, 50 F.R.D. 76, 79 (E.D. Pa. 1970). *See, Daye* v. *Commonwealth of Pennsylvania*, 344 F.Supp. 1337, 1343 (E.D. Pa. 1972), *aff'd*, 483 F.2d 294 (3d Cir. 1973). The court in *Causey* also reasoned that class certification of mass accident claims should be denied because they present a wide choice of litigation strategy and tactics, which different litigants and counsel will approach in various ways. 66 F.R.D. at 399. *See, Marchesi* v. *Eastern Airlines, Inc.*, 68 F.R.D. 500, 501 (E.D.N.Y. 1975).

Different interests and trial strategies abound in the skywalk cases. Ms. Rau has brought suit only against those whom she perceives to be the eight major defendants out of twenty entities whom the district court apparently has joined in the class action.[17] If she must go to trial, Ms. Rau wishes to take advantage of Missouri's law granting a right to a twelve person jury and permitting a verdict based on a three-fourths vote of the jurors, a procedure unavailable in federal court.

Under Missouri law, Ms. Rau has the right to adduce evidence at trial on her age, sex, health and *character* in support of her punitive damages claim. *Hoene* v. *Associated Dry Goods Corp.*, 487 S.W.2d 479, 486 (Mo. 1972). This evidence will cause a class trial on punitive damages to degenerate into multiple lawsuits. It will also precipitate a major conflict of interest between class members who seek equal distribution of any punitive damages award among all claimants, and those who can fairly assert that the evidence entitles them to more than an equal share.

Differences in strategy also affect Ms. Rau's right to settle her cases. Counsel for the class insist either that defendants be barred from settling punitive damages claims, or that defendants be barred from adducing evidence that they paid punitive damages to claimants who settle, or that the class be allowed to prove that settlement payments were made by defendants solely for compensatory damages and not for punitive damages. The position of the class counsel benefits class members like Molly Riley who expect their punitive damages to exceed

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[17] The decision concerning which defendants to sue is a strategic judgment, and each litigant has a vital interest in exercising that judgment independently. *Hobbs* v. *Northeast Airlines, Inc.*, 50 F.R.D. 76, 79 (E.D. Pa. 1970); *Causey* v. *Pan American World Airways, Inc.*, 66 F.R.D. 392, 399 (E.D. Va. 1975).

their nominal compensatory damages. But that strategy is exceedingly damaging to those unnamed class members, such as Ms. Rau, whose compensatory damages far outweigh any punitive damages they expect to collect and who may be willing to settle prior to trial for the reasonable value of their compensatory damages in return for a release of all of their damages claims, compensatory and punitive. The harm imposed upon unnamed class members from class certification under these circumstances simply outweighs the benefits supposedly gained.[18]

In a recent series of decisions, the Ninth Circuit has specifically held that Rule 23(b)(1) class certification of claims arising from a mass accident is inappropriate. *In Re: Northern District of California, Dalkon Shield IUD Products Liability Litigation*, Nos. 81-4648 to 81-4656, *slip op.* 6-8 (9th Cir. June 18, 1982); *Vincent* v. *Hughes Air West, Inc.*, 557 F.2d 759, 767 (9th Cir. 1977); *McDonnell Douglas Corp.* v. *United States District Court for the Central District of California*, 523 F.2d 1083, 1085 (9th Cir. 1975) *cert. denied sub nom., Flanagan* v. *McDonnell Douglas Corp.*, 425 U.S. 911 (1976); *La Mar* v. *H & B Novelty & Loan Co.*, 489 F.2d 461, 465-68 (9th Cir. 1973).

Although there is no conflict among the circuits, this issue is an important one for this Court to address in light of the increasing amount of mass tort litigation and differing views on how it should be handled. Compare *McDonnell Douglas Corp.* v. *United States District Court for the Central District of California*, 523 F.2d 1083 (9th

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[18] This Court should also note that the various cases arising out of the skywalk collapse were proceeding expeditiously under the auspices of plaintiffs' and defendants' liaison committees in the Circuit Court for Jackson County, Missouri, well before the institution of the class action in federal court, and after the class was vacated. That entire process was disrupted when class counsel controlled the skywalk litigation in federal court.

Cir. 1975), *cert. denied sub nom., Flanagan* v. *McDonnell Douglas Corp.*, 425 U.S. 911 (1976); 7A C. Wright and A. Miller, *Federal Practice and Procedure: Civil*, § 1783 (1972); and Notes of the Advisory Committee on the 1966 Amendments to the Federal Rules of Civil Procedure, 39 F.R.D. 69, 103. This Court should confirm the approach of the Ninth Circuit, and reject class action treatment for mass torts such as the skywalk cases.

IV.

DUE PROCESS REQUIRES THAT THE DISTRICT COURT ALLOW ANY CLASS MEMBER WHO IS NOT ADEQUATELY REPRESENTED IN A MANDATORY CLASS ACTION TO OPT-OUT.

The only arguably proper type of class certification for claims arising out of the skywalks collapse would be under Rule 23(b)(3) so that Ms. Rau, who is not adequately represented, may exercise a right to opt-out.

In *Bentkowski* v. *Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401, 402-03 (E.D. Pa. 1976), the court redesignated a class from one under Rule 23(b)(1)(A) to one under 23(b)(3). The trial judge based this change on the view expressed in *McDonnell Douglas* and *LaMar* that cases arising out of mass torts should not be certified as mandatory class actions. Other courts have also denied class certification of mass tort cases under Rule 23(b)(1) or (b)(2) and limited them to Rule 23(b)(3). *In re Agent Orange Product Liability Litigation*, 506 F.Supp. 762, 787-91 (E.D.N.Y. 1980); *Pruitt* v. *Allied Chemical Corp.*, 85 F.R.D. 100, 106-09 (E.D. Va. 1980); *Payton* v. *Abbott Labs*, 83 F.R.D. 382, 388-92 (D. Mass. 1979). *See, Smith* v. *Reader's Digest Association, Inc.*, 19 F.R. Serv.2d 501 (S.D.N.Y. 1974) (class certified under (b)(3) rather than (b)(2) in sex discrimination case where prospect of in-

dividual determinable damage claims exist and a large number of defendant's employees want to have nothing to do with lawsuit); *American Trading and Production Corp.* v. *Fischbach & Moore, Ind.*, 47 F.R.D. 155 (N.D. Ill. 1969) (1,200 exhibitors at housewares convention whose merchandise was destroyed by fire certified as a (b)(3) class).

Ms. Rau must be afforded the right to opt-out even if a mandatory class action is proper in this case.[19] Section 2072 of Title 28 of the United States Code, which authorizes promulgation of Rule 23 by this Court, provides: "Such rules shall not abridge, enlarge or modify any substantive right . . ." The Due Process Clause protects Ms. Rau's right to appear and be heard through counsel of her choice.[20] However, Ms. Rau cannot be represented

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[19] Courts have allowed opting-out of Rule 23(b)(2) class actions even though Rule 23(b)(2), like Rule 23(b)(1), does not expressly provide for such a procedure. *See, e.g., Battle* v. *Municipal Housing Authority for the City of Yonkers*, 53 F.R.D. 423, 426 (S.D.N.Y. 1971); *Clem* v. *Cooper Communities, Inc.*, 344 F. Supp. 579, 585 (E.D. Ark. 1972); *United States ex rel. Walker* v. *Mancusi*, 388 F. Supp. 311, 316 n.4 (W.D.N.Y. 1971), *aff'd*, 467 F.2d 51 (2d Cir. 1972).

[20] *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, 1117-18 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). This Court has said that "[i]f in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). *Accord, Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970); *Roberts* v. *Anderson*, 66 F.2d 874, 876-78 (10th Cir. 1933); *Rex Investigative and Patrol Agency, Inc.* v. *Collura*, 329 F. Supp. 696, 699 (E.D.N.Y. 1971). Thus, a civil litigant has a constitutional right to the assistance of retained counsel implicit in the concept of due process.

fairly by the designated class attorneys. *See*, pp. 20-22, above. Thus, the district court cannot impose class counsel on Ms. Rau pursuant to Rule 23 without violating her right to due process of law and 28 U.S.C. § 2072.

Even if a class action were appropriate in the skywalk cases, this Court should confirm Ms. Rau's right to opt-out of any class action certified.

CONCLUSION

Cross-Petitioner respectfully requests that this Court: (1) reverse the decision of the United States Court of Appeals for the Eighth Circuit holding that the district court judge was not disqualified under 28 U.S.C. § 455(a) and remand with instructions to assign the individual skywalk cases to a new judge and (2) affirm the decision of the United States Court of Appeals for the Eighth Circuit vacating the district court's order of January 25, 1982.

Respectfully submitted,

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APPENDIX A

In re FEDERAL SKYWALK CASES.

In re Melanie Hanson JOHNSON and Gerard Stanley Johnson, et al., Petitioners.

In re FEDERAL SKYWALK CASES.

In re Jacqueline N. RAU, Appellant.

Nos. 82-1181, 82-1207.

United States Court of Appeals, Eighth Circuit.

Submitted March 12, 1982.

Decided June 7, 1982.

McMILLIAN, Circuit Judge.

This action challenges the validity of a mandatory class certification order rendered by the United States District Court[1] for the Western District of Missouri during the course of litigation arising out of the collapse of two skywalks at the Hyatt Regency Hotel in Kansas City, Missouri in July, 1981.[2] The class was certified on the issues of liability for compensatory and punitive damages and

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[1] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

[2] *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D.Mo. 1982).

amount of punitive damages, and includes all business invitees at the hotel during the disaster.

Two objecting plaintiffs (objectors) now petition this court to vacate the order and disqualify the federal district judge asserting jurisdiction under 28 U.S.C. § 1292(a)(1), or alternatively, under mandamus.[3] In response the class representative argues that the order is interlocutory thereby precluding appellate review. Alternatively, the class representative argues that the federal district judge did not abuse his discretion in certifying the class and further that the class is appropriate.[4] For the reasons discussed below, we conclude that we do have jurisdiction under 28 U.S.C. § 1292(a)(1) and further that the order must be vacated because it violates the Anti-Injunction Act, 28 U.S.C. § 2283. We also conclude that 28 U.S.C. § 455(a) does not require the disqualification of the federal district judge.

On July 17, 1981, two skywalks in the central lobby of the Hyatt Regency Hotel in Kansas City, Missouri, collapsed killing 114 persons and injuring hundreds of others. Following the disaster numerous individual lawsuits were filed in both the Circuit Court for Jackson County, Missouri (state court), and the United States District Court

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[3] The individual plaintiff designations are *In re Jacqueline N. Rau* and *In re Melanie Hanson Johnson*. In addition, defendant Crown Center Redevelopment Corp., Hallmark Cards, Inc., Hyatt Corp. and the Plaintiffs' Liaison Committee participated as amici curiae. All amici curiae oppose class certification, but only the Plaintiffs' Liaison Committee seeks disqualification of the district judge.

[4] The class representative argues that class certification is an appropriate device to handle the claims arising out of the disaster. However, in view of our holding, we do not reach the merits of these arguments.

for the Western District of Missouri (district court).[5] The federal district court jurisdiction was based on 28 U.S.C. § 1332, diversity of citizenship.

The state court cases were consolidated and assigned to Judge Timothy O'Leary. The federal cases were also consolidated and assigned to Judge Scott O. Wright. Shortly after the first cases were filed, the state and district court consolidated their respective cases for discovery. Each court appointed a Plaintiffs' Liaison Committee to aid in discovery and other matters. In addition, the two courts appointed a joint state-federal Plaintiffs' Liaison Committee to aid in the consolidated discovery.[6] Each court held pretrial conferences and issued pretrial orders concerning the scheduling of discovery.

Prior to the class certification, the Plaintiffs' Liaison Committee accomplished substantial discovery and trial prepartion on behalf of all plaintiffs. The accomplishments included nearly completing the interrogatory phase of discovery and serving requests for production upon the defendants. In addition, the committee collected approximately 300,000 documents pertaining to the litigation and had arranged for a document depository available to all plaintiff's counsel. The committee had also arranged for the testing of the skywalk materials by the National Bureau of Standards. Brief *In re Melanie Hanson Johnson*, Appendix I "Affidavit of Patrick McLarney."

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[5] By the end of January, 1982, there were approximately 120 cases filed in state court and eighteen filed in district court. In addition, prior to the class certification, 123 claims had been settled at a total settlement cost of $18.5 million.

[6] The state court Liaison Committee consisted of twelve attorneys and the district court committee consisted of five attorneys. Three committee members were appointed by both courts and served on both committees.

On October 27, 1981, Molly Riley, a district court plaintiff, filed a motion for class certification. The motion sought class certification under Fed.R.Civ.P. 23(b)(1)(B), or in the alternative under 23(b)(3), as to the issues of liability for compensatory and punitive damages and the amount of punitive damages.[7] The basis for requesting

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[7] Fed.R.Civ.P. 23 provides in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole: or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the

(footnote continued)

class certification was Riley's concern that there would be inadequate funds available to pay all claims for compensatory and punitive damages. Riley also moved that her counsel be appointed as lead counsel for the class.

Several federal and state court plaintiffs filed pleadings in opposition to Riley's motion. The objecting plaintiffs challenged Riley's and her attorney's qualifications to represent the class. They also challenged the need for and desirability of class action treatment arguing that there was no evidence of insufficient funds to satisfy all claims. A hearing was held before Judge Wright on December 10, 1981.

Prior to issuing the class certification order now on appeal, Judge Wright became aware that Riley could not serve as class representative because she was not of diverse citizenship from all defendants. Judge Wright then reviewed the complaints on file and determined that plaintiffs Stover, Johnson, Vrabel, Grigsby and Abernathy were diverse to all defendants.

Thereafter, Judge Wright placed two telephone calls to Robert Collins, Stover's attorney, and inquired whether Stover would serve as class representative if a class was

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(footnote continued)

findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Class members in a 23(b)(3) class are free to "opt out" while, under the majority rule, class members in a 23(b)(1)(A) or 23(b)(1)(B) class cannot "opt out." *See Reynolds* v. *Nat'l Football League*, 584 F.2d 280 (8th Cir. 1978).

certified.[8] Judge Wright also stated that if Stover would agree to be class representative he would appoint Collins as assistant class counsel to Riley's attorney if a class was certified. Judge Wright and Collins agreed to speak again after Collins consulted with Stover. Collins thereupon called defense counsel and unsuccessfully attempted to settle Stover's claim. Stover then agreed to be class representative.

On January 19, 1982, counsel for the objecting plaintiffs moved, pursuant to 28 U.S.C. § 455(a), to disqualify Judge Wright based on his communications with Collins.

On January 25, 1982, Judge Wright entered the order appealed from in which he (1) denied Riley's motion for class certification because her citizenship was not diverse from all defendants, (2) certified a class action under Rule 23(b)(1)(A) on the issues of liability for compensatory and punitive damages, (3) certified a class action under Rule 23(b)(1)(B) on the issues of liability for punitive damages and the amount of punitive damages, (4) selected plaintiffs Stover, Vrabel, Grigsby and Abernathy as class representatives,[9] (5) selected Riley's counsel as lead coun-

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[8] The content of the telephone conversations is disputed. Patrick McLarney, a state plaintiff's attorney, and Max W. Foust, a defendant's attorney, stated that Collins had told them that Judge Wright had told Collins he *was* going to certify a class and appoint Riley's counsel as lead counsel. In re Melanie Hanson Johnson Appendix Volume II Exhibits 13, 14, Affidavits of Max W. Foust and Patrick McLarney. Collins, however, states that Judge Wright only told him that he *might* certify a class. Appendix to Brief In Opposition to Petition for Mandamus Exhibit 6, Affidavit of Robert Collins.

[9] On February 1, 1982, Grigsby, Vrabel and Abernathy were deleted as class representatives because Grigsby had settled and Vrabel and Abernathy were not of diverse citizenship to Hyatt Corp.

sel, and counsel for the class representatives as assistant class counsel, (6) denied the motion to disqualify himself under § 455(a), explaining that he called Collins as a matter of courtesy and had intended to call the lawyers for Johnson, Vrabel, Grigsby and Abernathy but did not do so because the motion to disqualify was filed, and further that he had not decided to certify the class until the order was drafted and entered, and (7) denied objectors' request to certify an interlocutory appeal under 28 U.S.C. § 1292(b). *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D.Mo. 1982).

In support of its order the district court found that the general prerequisites for class actions prescribed by Rule 23(a) were satisfied, *id.* at 420-22, and that the specific requirements of Rule 23(b)(1) were also satisfied. The court stressed that the "interests of all parties concerned" would best be served by "the avoidance of wasteful, repetitive litigation," and that such litigation could be avoided by "trying the issues of liability for compensatory damages, liability for punitive damages and amount of punitive damages only once." *Id.* at 423.

In support of the Rule 23(b)(1)(A) class the court found that individual suits on the issues of liability for compensatory and punitive damages would create a risk of inconsistent results. *Id.* at 424.

In support of the Rule 23(b)(1)(B) class the court relied on three considerations. First, the defendants held liable for punitive damages might lack the funds to pay the full amount of such damages. *Id.* at 424. Second, individual suits for punitive damages would create a risk of unfairness to the other claimants because "there is some uncertainty under Missouri law as to whether a single defendant can be liable for more than one award of puni-

tive damages.'"[10] *Id.* at 424. Third, the court noted that the prosecution of individual punitive damage actions could create an ethical problem for counsel representing more than one victim in that the counsel would be forced to decide which suit to bring first. *Id.* at 425.

On February 9, 1982, the objectors filed their notice of appeal and petition for mandamus.

Our initial inquiry must be whether the order is appealable. Recognizing that the order is interlocutory, we would nevertheless have appellate jurisdiction under 28 U.S.C. § 1292(a)(1) (1976)[11] if that order is injunctive in character. Therefore, resolution of this issue depends upon the nature of the order. The objectors argue that the order enjoins them from prosecuting their state court actions for punitive damages. In response the class argues that the order is not an injunction because it does not use injunction terminology and, more importantly, it does not enjoin the objectors from settling their claims. The class characterizes the order as follows:

> [t]he motion concerns only whether the defendants can use individual punitive damage settlements as evidence to defeat or diminish the recovery of punitive damages in the classwide trial on that issue. *The representative plaintiff and the class have never*

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[10] It appears that the main concern underlying Judge Wright's certification is that there is an uncertain question of Missouri law as to whether plaintiffs may seek to recover multiple awards of punitive damages arising from a single wrongful act of a defendant.

[11] 28 U.S.C. § 1292(a)(1) provides in pertinent part:

> (a) The courts of appeals shall have jurisdiction of appeals from:
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> (1) Interlocutory orders of the district courts of the United States . . . , granting, continuing, modifying, refusing or dissolving injunctions . . . .

> *sought to enjoin any member of the class from entering into an individual settlement of any claim.*

Brief on Behalf of the Representative Plaintiff and the Class at 4 (emphasis added). We do not agree with that characterization and conclude that we do have jurisdiction under 28 U.S.C. § 1292(a).

The determination of whether an order is an injunction depends upon the substantial effect of the order rather than its terminology. *See Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188, 63 S.Ct. 163, 87 L.Ed. 176 (1942); *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975).

In the present case, contrary to the class's assertion, the district court expressly prohibited class members from settling their punitive damage claims:

> Legitimate claimants may negotiate and execute settlements with those defendants who have vociferously urged this court to allow the settlement process to continue. *Those claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damage issues.*

In re Federal Skywalk Cases, at 428 (emphasis added). In addition, the substantial effect of the order also enjoined the state plaintiffs from pursuing their pending state court actions on the issues of liability for compensatory and punitive damages and the amount of punitive damages.

At oral argument counsel for the class argued that 28 U.S.C. § 1292(a)(1) should not be construed to apply to class certification because the inevitable effect of a mandatory class is an injunction against state court actions on class issues. We conclude that the argument is not persuasive on the facts before us.

It is true that parties to a mandatory class are not free to *initiate* actions in other courts to litigate class certified issues. *See Reynolds* v. *National Football League*, 584 F.2d 280, 283 (8th Cir. 1978). However, in the present case the objectors had commenced their state court actions before the motion for class certification had been filed in district court. The state court cases had been filed, consolidated, and discovery had begun.[12] It is this injunction against pending state court actions that gives us jurisdiction under 28 U.S.C. § 1292(a). *See In re W.F. Hurley, Inc.*, 553 F.2d 1096, 1101 (8th Cir. 1977); *In re Glenn Turner Enterprises Litigation*, 521 F.2d at 775.

Because we have jurisdiction over the appeal and because the injunction is interdependent with the remainder of the appealed order, we may review the entire order insofar as it has been appealed. *See Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 287, 61 S.Ct. 229, 232, 85 L.Ed. 189 (1940) (jurisdiction reviewable); *Adashunas* v. *Negley*, 626 F.2d 600, 602 (7th Cir. 1980) (class issues reviewable); *Emerson Electric Co.* v. *Black and Decker Manufacturing Co.*, 606 F.2d 234, 237 (8th Cir. 1979) (venue reviewable). Therefore, we need not decide wheth-

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[12] Judge O'Leary had also aided in the settlement process by convincing the insurers for Hallmark Cards, Inc., Crown Center Redevelopment Corp. and the Hyatt Corp. to commit a minimum of $151 million of the total $333 million liability insurance coverage to the settlement of the claims. *Hyatt Corp.* v. *Occidental Fire & Cas. Co.*, No. CV81-22009 (Mo.Cir.Co. Dec. 30, 1981), transcript 54-55, 75-77.

Prior to the class certification 123 cases had been settled. The settlement process slowed down considerably after the class certification because the plaintiffs were not able to release their punitive damage claims. *In re Federal Skywalk Cases*, at 428. The defendants were unwilling to pursue only compensatory damages settlements.

er the order would have been reviewable as a petition for mandamus.

Our conclusion that the order enjoins pending state proceedings necessitates an inquiry as to the propriety of that order under the Anti-Injunction Act, 28 U.S.C. § 2283. The Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."

In *Atlantic Coast Line R.R.* v. *Locomotive Engineers*, 398 U.S. 281, 286-87, 90 S.Ct. 1739, 1742-43, 26 L.Ed.2d 234 (1970), the Supreme Court recognized that the Act imposes a flat and positive prohibition:

> On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondents here have intimated that the Act only establishes a "principle of comity," not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention. In 1955 when this Court interpreted this statute, it stated: "This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511, 515-516, [75 S.Ct. 452, 455, 99 L.Ed. 600] (1955).

Recently a plurality of the Court in *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 630-31, 97 S.Ct. 2881, 2887, 53 L.Ed.2d 1009 (1977), emphasized the continuing force of *Atlantic Coast Line*:

> The origins and development of the present Act, and of the statutes which preceded it, have been amply described in our prior opinions and need not be restated here. The most recent of these opinions are *Mitchum* v. *Foster*, 407 U.S. 225, [92 S.Ct. 2151, 32 L.Ed.2d 705] (1972), and *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U.S. 281, [90 S.Ct. 1739, 26 L.Ed.2d 234] (1970). Suffice it to say that the Act is an absolute prohibition against any injunction of any state court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act. The Act's purpose is to forestall the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9, [60 S.Ct. 215, 218, 84 L.Ed. 447] (1940). Respondents' principal contention is that, as the Court of Appeals held, § 16 of the Clayton Act, which authorizes a private action to redress violations of the antitrust laws, comes within the "expressly authorized" exception to § 2283.
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> We test this proposition mindful of our admonition that:
>
> > "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line R.*

> *Co., supra* [398 U.S.] at 297, [90 S.Ct. 1739 at 1748].
>
> This cautious approach is mandated by the "explicit wording of § 2283" and the "fundamental principle of a dual system of courts." *Ibid.* We have no occasion to construe the section more broadly:
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> > "[It is] clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." *Clothing Workers* v. *Richman Bros. Co.*, 348 U.S. 511, 514, [75 S.Ct. 452, 454, 99 L.Ed. 600] (1955).
>
> 433 U.S. at 630-31, 97 S.Ct. at 2887 . . . .

See also County of Imperial v. *Munoz*, 449 U.S. 54, 101 S.Ct. 289, 66 L.Ed.2d 258 (1980) (reemphasizing absolute nature of the Act).

Therefore, if the injunction is to be upheld, it must be on the basis that the district court's authority derives from one of the three exceptions. On appeal the class relies on the "necessary in aid of its jurisdiction" exception. In support it first draws an analogy between the order and a Rule 22 interpleader under which a federal court can enjoin claimants from prosecuting claims in state court. The class reasons that here, as in the interpleader situation, there is a limited fund and that the class action is necessary to protect all claimants. We disagree.

The analogy is based on the premise that the possibility of defendants being required to pay only one punitive damage award is comparable to the limited fund concept underlying federal interpleader. That premise is erroneous. "Federal interpleader jurisdiction depends on identifiable property or a limited fund or pecuniary obligation, and it is not proper to predicate jurisdiction on the mere potential to recover damages for pecuniary in-

jury." *Murphy* v. *Travelers Insurance Co.*, 534 F.2d 1155, 1159 (5th Cir. 1976), *citing Wallach* v. *Cannon*, 357 F.2d 557 (8th Cir. 1966).

In the present case the class has an uncertain claim for punitive damages against defendants who have not conceded liability. The claim does not qualify as a limited fund which is a jurisdictional prerequisite for federal interpleader. Without the limited fund there is no analogy to an interpleader and no reason to treat the class action as an interpleader for purposes of the Anti-Injunction Act.

The class proposes a second analogy between the order and several earlier decisions which allowed an injunction when an insurance company brought a federal suit for a declaratory judgment that a particular policy was invalid and the beneficiary subsequently sues in state court to recover under the policy. We conclude that the analogy is not persuasive.

Initially we note that the most recent case cited by class was decided in 1940, long before the enactment of the current Anti-Injunction Act.[13] We also note that even the commentator cited by the class acknowledges:

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[13] The class representative cites the following cases in support of her argument: *Keystone Dairy Co.* v. *New York Life Ins. Co.*, 19 F.2d 68 (3d Cir. 1927); *Mutual Ben. Health & Accident Ass'n* v. *Teal*, 34 F.Supp. 714 (E.D.S.C.1940); *Jamerson* v. *Alliance Ins. Co.*, 87 F.2d 253 (7th Cir.), *cert. denied*, 300 U.S. 683, 57 S.Ct. 753, 81 L.Ed. 886 (1937) (by implication); *Brown* v. *Pacific Mut. Life Ins. Co.*, 62 F.2d 711 (4th Cir. 1933) (by implication). We need not decide how those cases would be decided today. *But see* 17 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure §§ 4222-4223 (1978), explaining that the Anti-Injunction Act was not applied as an absolute prohibition against enjoining state court proceedings until the Supreme Court's decision in *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941).

> . . . it seems probable that a federal court would not be warranted in enjoining the prosecution of a pending state action [on the policy], where it is brought during the contestable period and there is an opportunity to set up the defense of fraud in the state court . . . .

1A Moore's Federal Practice ¶910.225 at 2621.

In addition, the cited cases are distinguishable on the basis that they involved situations in which identical parties were litigating mutually exclusive theories concerning their rights in the same policy in different forums. Such is not the case here. Furthermore, as conceded by the class, the cases involved injunctions against subsequent state actions. In contrast, the injunction in the present case was against pending state actions.

Next the class argues that allowing individual actions in state court will nullify the purpose of the class. The Supreme Court has narrowly intepreted the "necessary in aid of jurisdiction" exception, and a pending state suit must truly interfere with the federal court's jurisdiction. As the objectors correctly point out, a plurality of the Supreme Court reaffirmed in *Vendo Co.* its earlier holdings that a simultaneous *in personam* state action does not interfere with the jurisdiction of a federal court in a suit involving the same subject matter.

> In *Toucey* v. *New York Life Ins. Co.*, 314 U.S. [118], at 134-135, [62 S.Ct. 139, 144, 86 L.Ed. 100 (1945)], we acknowledged the existence of a historical exception to the Anti-Injunction Act in cases where the federal court has obtained jurisdiction over *res*, prior to the state-court action. Although the "necessary in aid of" exception to § 2283 may be fairly read as incorporating this historical *in rem* exception, see C. Wright, Federal Courts, § 47, p. 204 (3d ed. 1976), the

federal and state actions here are simply *in personam*. The traditional notion is that *in personam* actions in federal and state court may proceed concurrently, without interference from either court, and there is no evidence that the exception to § 2283 was intended to alter this balance. We have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court; as we stated in *Kline* v. *Burke Construction Co.*, 260 U.S. 226, [43 S.Ct. 79, 67 L.Ed. 226] (1922):

> "[A]n action brought to enforce [a personal liability] *does not tend to impair or defeat the jurisdiction* of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* . . . ." *Id.*, at 230, [43 S.Ct. 79 at 81] (emphasis added).

433 U.S. at 641-42, 97 S.Ct. at 2892-93 . . . .

In the present case the federal and state actions are *in personam* claims for compensatory and punitive damages. Therefore, based on the foregoing principles, we are compelled to hold that despite Judge Wright's legitimate concern for the efficient management of mass tort litigation, the class certification order must be vacated. Mr. Justice Black's concluding words in *Atlantic Coast Line* are particularly apt here:

> This case is by no means an easy one. The arguments in support of the union's contentions are not insubstantial. But whatever doubts we may have are strongly affected by the general prohibition of § 2283.

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

398 U.S. at 296-97, 90 S.Ct. at 1747-48.

The foregoing ruling does not dispose of the entire appeal because the objectors also seek the disqualification of Judge Wright under 28 U.S.C. § 455(a), which provides that a judge ". . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The objectors argue that Judge Wright's ex parte communications with Collins raise reasonable questions as to whether Judge Wright is biased in favor of the obliging class members. We disagree.

28 U.S.C. § 455(a) requires a judge to disqualify himself if a reasonable person would have factual grounds to doubt the impartiality of the court. *Blizard* v. *Frechette*, 601 F.2d 1217, 1220 (1st Cir. 1979). The determination for the district judge to make is whether "his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Once that determination has been made, our role on review is limited to deciding whether the district court's evaluation of the claim of partiality or prejudice amounted to an abuse of discretion. *Blizard* v. *Frechette*, 601 F.2d at 1221.

Initially we note that we do not condone Judge Wright's communications with Collins. Once it became apparent that the named plaintiff could not serve as class representative, we think the better practice would have been for the district judge to have called counsel of all potential class representatives and held a hearing to determine whether any of them would serve as class representative

in the event the district judge decided to certify a class. However, after a careful review of the entire record, we conclude that Judge Wright did not abuse his discretion in refusing to disqualify himself.

A claim of bias must be evaluated in light of the full record, not simply in light of an isolated incident. *See Walker* v. *Bishop*, 408 F.2d 1378, 1382 (8th Cir. 1969). In the present case Judge Wright developed an extensive record before he made his decision to certify the class. By order dated November 17, 1981, Judge Wright directed the parties and invited all interested parties to submit briefs on any issues relevant to the certification of a class. On December 10, 1981, Judge Wright held a hearing on the motion at which time the parties had the opportunity to present their objections to the court. During the course of the hearing, Judge Wright decided that two additional issues needed briefing, namely (1) whether multiple punitive damage verdicts could be obtained by successive plaintiffs based on the same conduct and (2) whether Missouri law allows recovery of punitive damages in wrongful death actions. These issues were briefed and submitted to Judge Wright before he made his decision to certify the class.

The order itself is carefully reasoned and stresses Judge Wright's concern that "[i]f a defendant can only be punished once, then the first claimant to get an award [of punitive damages] is the first and only winner. The Court is not inclined to permit the sacrifice of one aggrieved party's claim for the sole benefit of another aggrieved party." *In re Federal Skywalk Cases*, slip op. at 424-25.

We conclude that Judge Wright certified the class based solely on his judgment that such action would best serve the interests of all parties involved. In addition, we note

the complexity of the issues before Judge Wright and commend his creative efforts in attempting to achieve a fair, efficient and economical trial for the victims of the Hyatt Regency disaster.[14] However, as explained above, the order cannot stand on the facts before us.

The order of the district court is vacated.

HEANEY, Circuit Judge, dissenting.

The majority decision is very narrow, holding that the mandatory class action certified by the court below violates the Anti-Injunction Act. It is clear, as the majority recognizes, that the Act would not be contravened by an opt-out class action. On remand, the district court should consider whether such an opt-out class is appropriate.

I dissent, nonetheless, because I believe that the district court's mandatory class action, if slightly modified, would be proper. We should modify the district court's order by permitting punitive damage claims to be settled and by providing that the defendants will receive credit for any such settlements when and if there is a classwide award of punitive damages. Such a modified class action would satisfy the requirements of Fed.R.Civ.P. 23 and would not violate the Anti-Injunction Act. Moreover, it would provide the fairest way for all plaintiffs to seek recovery in the manner in which they choose—either through settlement or prompt judicial resolution of their claims.

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[14] We note that several commentators, including Professors Moore, Wright and Miller, also maintain that class actions are particularly appropriate for disposing of mass accident litigation. *See* Comment, *Mass Accident Class Actions*, 60 Cal.L.Rev. 1615, 1616 n.7 (1972).

I.

INTRODUCTION.

The crucial issue on this appeal is the effect of the district court's class certification order on the settlement process. As long as a class suit does not prevent the plaintiffs who wish to settle from doing so, no one seriously contends that it will deny them the opportunity to secure fair and expeditious compensation for their losses—either by settling or promptly proceeding to trial. The objectors, however, urge that settlements are blocked by the district court's order because individual plaintiffs cannot settle punitive damage claims,[1] and thus cannot execute general releases. Without such general relases, the objectors claim that the defendants are not protected against any further assertion of claims by settling plaintiffs.

I share the majority's belief that those plaintiffs who wish to settle all their claims should be permitted to do so. The class action need not be decertified to achieve this result. This goal can be accomplished by modifying the district court's order: (1) to expressly permit the settlement of punitive damage claims, and (2) to provide that the defendants will receive credit for the punitive claims they settle when and if a class-wide punitive damage award is ordered. Both the class action plaintiffs and the defen-

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[1] The district court's class certification order expressly prohibits class members from settling their punitive damages claims:

> Legitimate claimants may negotiate and execute settlements with those defendants who have vociferously urged this court to allow the settlement process to continue. *Those claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damage issue.* [Emphasis added.]

dants have suggested methods for providing credit to the defendants for any claims they settle.[2] It may be that a hearing on the issue would develop additional alternatives. In my view, the district court should be directed to proceed without delay to hold the necessary hearings and adopt a procedure. As soon as this result is accomplished, the settlement process could proceed unimpeded by the class lawsuit.

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY CERTIFYING A MANDATORY CLASS ACTION.

The district court's order cannot be vacated unless its certification of the class action constitutes an abuse of discretion. *E.g., Rule* v. *International Association of Bridge, Structural & Ornamental Ironworks*, 568 F.2d 558, 563 (8th Cir. 1977). I believe that the district court did not abuse its discretion; its certification order is supported by several important considerations.

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[2] Class counsel suggest that a class-wide punitive damage trial, including settling and non-settling plaintiffs, be held to determine the total punitive damages, if any, to be awarded. The sum awarded would then be allocated among the plaintiffs in accordance with an equitable formula approved by the court, with the portion of the award earmarked for settling plaintiffs credited to the defendants.

The defendants suggest that the plaintiffs who have settled not be permitted to participate in the punitive damage trial and that the defendants be permitted to introduce evidence of the settlements they have reached. The jury would then determine the amount of punitive damages, if any, to be divided among the non-settling plaintiffs at trial according to the approved formula.

A. *Justifications for Class Certification.*

The plaintiffs who sustained serious injuries or seek to recover for the death of family members should not be denied the opportunity to be promptly compensated. Likewise, plaintiffs seeking less substantial actual damages and punitive damages should not be effectively deprived of their claims. A class suit provides a device by which these smaller claims can be aggregated and litigation costs prorated among numerous claimants, thereby making worth while claims that might otherwise not be pursued.[3] *E.g. Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 338, 100 S.Ct. 1166, 1173-74, 63 L.Ed.2d 427 (1980). *See* Comment, *The Use of Class Actions for Mass Accident Litigation*, 23 Loyola L.Rev. 383, 384-385 (1977). Note, *Developments in the Law—Class Actions*, 89 Harv.L.Rev. 1318-1322, 1354-1355 (1976). Thus, a class action provides the best method for *all* plaintiffs to vindicate their legitimate claims.

A class suit on the liability and punitive damage issues also provides an effective means to confine and manage the substantial litigation arising from this mass disaster. *See, e.g.*, 7A Wright & Miller, Fed. Prac. & Proc.: Civil, § 1783 at 116-117 (1972); Note, *Developments in the Law—Class Actions, supra*, 89 Harv.L.Rev. at 1318-1322, 1354-1355; Note, *Mass Accident Class Actions*, 60 Cal.L.Rev. 1615 *passim* (1972). It conserves litigant and judicial resources by permitting the liability and punitive damage issues to be tried once, and only once; thereby avoiding a multiplicity of lawsuits on the same issues involving the same facts

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[3] Here, individual actions would impose an enormous financial burden on individual victims because of the hundreds of thousands of documents involved, the importance of expert testimony regarding engineering and architectural matters, and the numerous defendants each disclaiming responsibility and pointing at others.

and the same defendants.[4] Moreover, it promotes judicial economy by focusing this litigation in the court that will have to resolve the major disputed issues in this case. The defendants have already begun to file in the federal district court their lawsuits to determine the respective liability and contribution issues among the various tort feasors.

Moreover, a single class-wide adjudication of punitive damages ensures that every victim will receive his or her just share of any punitive damage award. Absent a class action, the distribution of punitive damages will be determined in a succession of individual lawsuits. In that event, the risk exists that individual juries will reach inconsistent results on the liability and damage issues. Moreover, even if the results are consistent, the risk arises that late-suing plaintiffs will have their punitive damage recoveries reduced or even eliminated by prior awards because there is certainly some limit on the amount of exemplary damages the defendants will be required to pay.[5] A class action suit provides the most effective—and perhaps only—pro-

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[4] If the issue of liability for compensatory damages was not tried on a class-wide basis, every individual suit would require a determination of relative fault among all defendants held liable. Individual plaintiffs could not avoid this problem by relying on earlier verdicts because Missouri law while rejecting the old doctrine of mutuality of estoppel, *see Oates* v. *Safeco Ins. Co.*, 583 S.W.2d 713, 719 (Mo.1979) (en banc), does not generally allow offensive use of collateral estoppel in multiple claimant tort cases. *See Tretter* v. *Johns-Manville Corp.*, 88 F.R.D. 329, 333 (E.D.Mo.1980). Due process would forbid the defendants from estopping a plaintiff by relying on an earlier verdict in a suit to which the plaintiff was not a party. *See, e.g., Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 n.7, 99 S.Ct. 645, 649 n.7, 58 L.Ed.2d 552 (1979).

[5] Punitive damages may be limited here either by Missouri law, constitutional due process, or simply the extent of defendant's assets. *See* at 1187-1188, *infra*, for discussion.

cedure to ensure that any recovery will be distributed equitably among all plaintiffs.[6] *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 838-842 (2d Cir. 1967) (dicta); *In Re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 526 F.Supp. 887, 897-900 (N.D.Cal. 1981) (hereafter cited as *In re Dalkon Litigation*). *See* Putz & Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, 16 U.San Fran.L.Rev. 1, 18-40 (1981); Note, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L.J. 1797, 1800-1812 (1979); Note, *Mass Accident Class Actions*, *supra*, 60 Cal.L.Rev. at 1624-1639.

B. *Objections to Class Certification.*

Despite these justifications for a class action, the objectors argue that the district court's order constitutes an abuse of discretion.[7] Most importantly, they contend that Rule 23(b)(1)(B) simply does not authorize a class action in this case. A class action may be certified under Rule 23(b)(1)(B) when a number of individuals claim rights to a share of a fund that is too small to satisfy in full every individual's claim. *See, e.g., Green* v. *Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 & n.9 (9th Cir. 1976); *Coburn* v. *4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D.Ky. 1977).

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[6] As the district court said in *In re Dalkon Litigation*, 526 F.Supp. 887, 900 (N.D.Cal.1981):

> Without a Rule 23(b)(1)(B) class action, * * [t]here is no basis for priority to punitive damages among the claimants, or for awarding such damages to one or more and not to others * * *. *[T]he class action is the best available device to protect the interests of all parties.* [Emphasis added.]

[7] A class action certified under Rule 23(b)(1) must satisfy both the requirements of Rule 23(a)(1)-(4) and the relevant subsection to (b)(1). *See* p. 1178 n.7 for the relevant provisions of Rule 23.

See also Note, *Developments in the Law—Class Actions*, *supra*, 89 Harv.L.Rev. at 1367. The objectors claim that the facts here do not support the district court's finding that there is a limited fund available to pay punitive damages awards. I disagree.[8]

Missouri law may preclude multiple punitive damage awards for a single wrongful act or omission. At oral argument, the objectors and the class representatives both con-

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[8] The objectors also claim that the district court's certification of a Rule 23(b)(1)(A) class on the issues of liability for compensatory and punitive damages was an abuse of discretion. They contend that Rule 23(b)(1)(A) is designed to eliminate the dilemma that would confront a party if judgments imposing conflicting and mutually incompatible standards of conduct are entered against it. They argue it is not intended, as the district court concluded, to apply to a situation in which there is only a possibility that a defendant might have to pay damages to some plaintiffs and not others. I agree with the objector's construction of Rule 23(b)(1)(A). *See, e.g., McDonnell Douglas Corp.* v. *U. S. District Court*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976); *Esler* v. *Northrup Corp.*, 86 F.R.D. 20, 38 (W.D.Mo. 1979); 7A Wright & Miller, Fed.Prac. & Proc.: Civil § 1773 at 9 (1972).

Although the district court's reliance on Rule 23(b)(1)(A) was misplaced, its class certification was nonetheless appropriate. The issue of liability for compensatory damages could have been properly certified under Rule 23(b)(1)(B) along with the issues of liability for and amount of punitive damages. Under Missouri law, a defendant cannot be liable for punitive damages if her or she is not also liable for compensatory damages. *Probst* v. *Probst*, 595 S.W.2d 289, 292 (Mo.App.1979). Thus, the prospect of a limited fund is dependent on liability for compensatory, as well as punitive, damages. In addition, quite apart from any construction of Rule 23(b)(1)(A), the district court's concern for avoiding inconsistent results through individual determinations of the liability issues is a proper consideration in certifying any of the types of class action authorized by Rule 23.

ceded that the state law is uncertain and that there is a legitimate and reasonable argument that a defendant can be punished only once for conduct transcending ordinary negligence. The Missouri Court of Appeals recently dismissed as moot a case in which they might have resolved this question. *Monsanto Co.* v. *Parker*, 634 S.W.2d 506 (Mo. App. 1982). Thus, an award of punitive damages to the first litigant may preclude all subsequent awards to later plaintiffs. The harshness and unfairness of this potential result justifies the district court's class certification.

Even if multiple punitive damage awards are permissible, the class certification was appropriate because the defendants held liable may not have the capacity to satisfy the judgments against them.[9] The claims of those victims who have filed individual lawsuits exceed $1 billion in compensatory damages and $500 million in punitive damages. The total insurance of all the defendants is only $333 million. Moreover, the record does not reveal how that insurance coverage is divided among the defendants and how much, if any, of it is available to pay punitive damage awards.[10] Furthermore, we cannot determine on the record before us the net worth of the various defendants. If the three largest defendants—Crown Center, Hallmark and Hyatt—are not found liable for punitive

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[9] Rule 23(b)(1)(B) does not require proof that claims "will," as a certainty, exhaust the defendant's capacity to pay. Certification is appropriate if there is a significant likelihood that individuals "may" effect claims of parties not before the court. *See* Fed.R.Civ.P. 23(b)(1)(B) advisory committee note; *In re Dalkon Litigation*, *supra*, 526 F.Supp. at 897; *Coburn* v. *4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D.Ky.1977).

[10] Punitive damages frequently cannot be insured against. *See* Mallor & Roberts, *Punitive Damages: Toward a Principal Approach*, 31 Hastings L.J. 639, 641 (1980).

damages, the insurance coverage and assets of the remaining defendants would become significant indeed because they may well not be sufficient to satisfy the exemplary damage judgments in view of the large amounts sought by the plaintiffs.

Apart from the defendants' capacity to pay punitive damages, there is surely some limit imposed by law on the amount for which they can be held liable for a single wrongful act or course of conduct. Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of "fundamental fairness" that is essential to constitutional due process. *See Roginsky* v. *Richardson-Merrell, Inc., supra,* 378 F.2d at 838-841; *In re Dalkon Litigation, supra,* 526 F.Supp. at 900. *See also Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?, supra,* 16 U.San Fran.L.Rev. at 29-31; Note, *Mass Liability and Punitive Damages Overkill, supra,* 30 Hastings L.J. at 1797-1800. Moreover, the basic jurisprudential precepts that litigation must come to an end and that a party cannot be repeatedly sued on the same cause of action are violated by excessive multiple punishment. *See Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?, supra,* 16 U.San Fran.L.Rev. at 29-31; Note, *Mass Liability and Punitive Damages Overkill, supra,* 30 Hastings L.J. at 1797-1800.

Consequently, I believe that the district court did not err in finding a significant likelihood that the punitive damage awards *may* exhaust the culpable defendants' capacity to pay the judgments.

The objectors next contend that the named class representative, Shirly Stover, does not "fairly and adequately protect the interests of the class" as required by Rule

23(a)(4). They base their claim on the fact that she did not move for class certification. While a class representative's failure to move for certification has been found in some circumstances to be an indication that he or she will not adequately represent the class, such a failure is not dispositive of the issue. Indeed, a court may select as a class representative a class member who did not file for certification, *see e.g., United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 407, 100 S.Ct. 1202, 1214, 63 L.Ed.2d 479 (1980), or it may even elect to certify a class and select a class representative even if no party seeks a class action. *See, e.g., Ford* v. *U. S. Steel Corp.*, 638 F.2d 753, 754 (5th Cir. 1981); *In re Dalkon Litigation*, *supra*, 526 F.Supp. at 894.[11] In addition, there was, of course, no need for Stover to move for class certification in this case since Molly Riley had already done so.

The objectors also argue that the counsel appointed for the class are inadequate because they are tainted with conflicts of interest. I find no support in the record for this contention.[12]

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[11] The fact that a court has authority to certify a class action *sua sponte* also refutes the objectors claim that the district court lacked jurisdiction to create a class action because the only party that did move for certification of a class, Molly Riley, was not diverse to all the defendants.

[12] The objectors complain that the district court appointed class counsel without providing a full opportunity for all plaintiffs to participate in the selection. This conduct did not constitute reversible error; although it would have been the better practice to include all plaintiffs in the selection process. *See* Manual for Complex Litigation, Part I, §§ 1.90-1.93, 4.53. In the district court's defense, however, it must be emphasized that the objecting plaintiffs indicated as strongly as they could that they had no interest in participating in a class action. If an opt-out class is certified on remand, the district court may provide for additional class counsel.

The objectors next claim that class certification was improper because the various claims present individual issues and the individual claimants have a strong interest in controlling their litigation. In particular, they rely on the Advisory Committee Notes to the 1966 amendments to the Federal Rules of Civil Procedure which indicate that class actions under Rule 23(b)(3) generally are inappropriate in mass accident cases.

The petitioners reliance on this authority is misplaced. First, under the express terms of Rule 23, individual control is an articulated concern for courts to consider with respect to certifying a class only under subsection (b)(3), not subsection (b)(1) on which the district court here relied. Thus, the district court was not necessarily required to consider the claimants' interest in individual control before certifying a class under Rule 23(b)(1).[18]

Second, to the extent that the interest in individual control is relevant to certifying a Rule 23(b)(1) class, that concern does not preclude a class suit in mass accident cases. If the drafters of the rule had intended to create such a per se rule, they would have simply said so. *See* Comment, *the Use of Class Actions for Mass Accident Litigation, supra*, 23 Loyola L.Rev. at 405. Instead, the drafters said:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class ac-

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[18] The petitioners' reliance on *Causey* v. *Pan American World Airways, Inc.*, 66 F.R.D. 392, 399 (E.D.Va.1975), and *Hobbs* v. *Northeast Airlines, Inc.*, 50 F.R.D. 76, 79 (E.D.Pa.1979), for their claim that the interest in individual control of claims supports a denial of a Rule 23(b)(1) class action is misplaced. Both the *Causey* and *Hobbs* courts relied on that interest as a ground not to certify a Rule 23(b)(3)—not a 23(b)(1)—class action.

> tion because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Fed.R.Civ.P. 23(b)(3) advisory committee note.

It is apparent that the concerns that prompted the drafters to conclude that class suits are not generally appropriate in mass accident cases are not applicable here. In this case, the facts relevant to liability will not differ meaningfully from one claimant to another, and there is little or no likelihood of individual defenses being presented. The compensatory damage issues, of course, will involve differing factual questions, but these claims present no bar to class certification because the district court limited the class action to the liability and punitive damage issues as permitted by Rule 23(c)(4). Consequently, the concerns of individualization of issues and the claimants' interest in controlling their own case present no real obstacle to class suits in mass accident cases such as the instant one. *E.g.*, 3B J. Moore, Fed.Prac., ¶ 23.45[3] at 811 & n.35 (2d ed. 1948); 7A Wright & Miller, *supra*, § 1783 at 117; Comment, *The Use of Class Actions for Mass Accident Litigation, supra*, 23 Loyola L.Rev. at 390; Note, *Mass Accident Class Actions, supra*, 60 Cal.L.Rev. at 1621.

Finally, the objectors contend that the district court's class certification deprives them of their constitutional rights. First, they argue that a class-wide award of damages to be divided among class members is a "fluid re-

covery'"[14] that denies them their constitutional rights to due process and trial by jury.

The Constitution does not create an absolute bar to a class-wide assessment of punitive damages. The objectors' Seventh Amendment right will be satisfied by the opportunity to adjudicate the class-wide damage assessment before a jury.[15] *See Dickinson* v. *Burnham*, 197 F.2d

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[14] A "fluid recovery" has three characteristics: (1) the amount of damages incurred by the class as a whole is adjudicated in a single trial, creating a damage fund; (2) class-member claimants who can prove valid claims may, after the class trial, obtain their proper share of the fund; and (3) the unclaimed portion of the fund is then applied to the class's benefit. *See* Comment, *Due Process and Fluid Class Recovery*, 53 Ore.L.Rev. 225, 227 (1974); Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.L.Rev. 477, 482 (1972).

It is the third characteristic that creates the fluid recovery because the unclaimed funds generally will be turned over to the government or distributed through the market—typically in the form of a reduced charge for an item that the defendant previously overpriced. Note, *Developments in the Law—Class Actions*, 89 Harv. L.Rev. 1318, 1525 (1976). *See Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1010-1011 (2d Cir. 1973); *Bebchick* v. *Public Utilities Commission*, 318 F.2d 187, 203-204 (D.C.Cir.1963). Here, the entire punitive damage award would be distributed to individual class members; consequently, the objectors are incorrect in claiming that the district court's order provided for fluid recovery. However, class-wide assessments of damages, even without fluid recovery, have also been challenged as violative of the constitutional guarantees of due process and trial by jury. *See* Note, *Developments in the Law—Class Actions, supra*, 89 Harv.L.Rev. at 1525.

[15] The objectors also claim that a class-wide assessment of punitive damages is impermissible under Missouri law because the damages "must be assessed by a jury in the light of the particular circumstances of the particular case." *Hupp* v. *North Hills Lincoln-*

(footnote continued)

973, 980-981 (2d Cir.), *cert. denied*, 344 U.S. 875, 73 S.Ct. 169, 97 L.Ed.2d 678 (1952) (1938 version of Rule 23). *See also, e.g.*, Note, *Developments in the Law—Class Actions*, *supra*, 89 Harv.L.Rev. at 1523-1525; Wright & Miller, *supra*, § 1784 at 122; Jacoby & Cherasky, *The Effects of Eisen IV and Proposed Amendments to Rule 23*, 12 San Diego L.Rev. 1, 24 (1974); Comment, *Due Process and Fluid Class Recovery*, 53 Ore.L.Rev. 225, 237 (1974); Note, *Eisen* v. *Carlisle & Jacquelin—Fluid Recovery, Minihearings, and Notice in Class Actions*, 54 B.U.L.Rev. 111, 123-124 (1974). In the absence of defenses that could be asserted against individual class members, or other such individualized inquiries, due process does not require multiple hearings as long as there is one full and fair determination of the merits. *See, e.g.*, Note, *Developments in the Law—Class Actions*, *supra*, 89 Harv.L.Rev. at 1523-1525; Comment, *Due Process and Fluid Class Recovery*, *supra*, 53 Ore.L.Rev. at 237; Note, *Eisen* v. *Carlisle & Jacquelin—Fluid Recovery, Minihearings, and Notice in Class Actions*, *supra*, 54 B.U.L.Rev. at 123-124.

In some circumstances courts have not permitted the class-wide calculation of damages. *See, e.g., Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (1973), *vacated and remanded on other grounds*, 417 U.S. 156, 94 S.Ct.

(footnote continued)

Mercury, Inc., 610 S.W.2d 349, 357 (Mo.App.1980). I disagree. This issue is one of first impression in Missouri. The cases relied on by the objectors are individual suits, not class actions, which merely state that the questions of whether to award punitive damages and, if so, in what amount are for the jury. *E.g., id.; Potter* v. *Milbank Manufacturing Co.*, 489 S.W.2d 197, 206 (Mo.1972); *Wisner* v. *S. S. Kresge Co.*, 465 S.W.2d 666, 669 (Mo.App.1971). Just as the Seventh Amendment right to a jury trial is satisfied by adjudicating the class-wide damages assessment before a single jury, the state law requirement is also satisfied.

2140, 40 L.Ed.2d 732 (1974); *In re Hotel Telephone Charges*, 500 F.2d 86, 92 (9th Cir. 1974). In other cases, however, the mechanism has been utilized. *See, e.g., Bebchick* v. *Public Utilities Commission*, 318 F.2d 187, 203-204 (D.C.Cir.), *cert. denied*, 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963); *West Virginia* v. *Chas. Pfizer & Co.*, 314 F.Supp. 710, 744 (S.D.N.Y.), *aff'd* 440 F.2d 1079, 1089-1091 (2d Cir.), *cert. denied*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). The propriety of class-wide damage assessment, with or without a fluid recovery mechanism, should depend on whether it is consistent with the policies of the underlying cause of action. Note, *Developments in the Law—Class Actions, supra*, 89 Harv.L.Rev. at 1526-1536.

The justifications for imposing punitive damages include expressing society's disapproval of outrageous conduct, deterring such conduct in the future, and providing incentives for private civil enforcement. Mallor & Roberts, *Punitive Damages: Toward a Principles Approach*, 31 Hastings L.J. 639, 647-650 (1980). Each of these purposes is advanced by the district court's class certification here. Thus, a class-wide calculation of punitive damages would be proper.

The objectors' second constitutional claim is that the district court denied them due process by not permitting them to be heard after its class certification order. Specifically, they object to the order providing:

> No matters may be presented to this Court which concerns [sic] a member of the class unless it is [sic] presented by the counsel designated to handle the class action. The Clerk of the Court has been directed to

reject any matters that are not being filed by counsel for the class or counsel for defendants.

In *Farber* v. *Riker-Maxson Corp.*, 442 F.2d 457 (2d Cir. 1971), the Second Circuit upheld an order of the district court virtually identical to the one here. The Court held that such an order did not deprive the parties prohibited from filing motions "an appropriate opportunity to participate in the litigation." *Id.* at 459. Indeed, the very nature of a class action requires that the class representative, and his or her attorney, represent the class and that members of the class cannot continue to file motions as they might in an individual action. Moreover, here, as in *Farber*, the district court's order did not bar counsel for class members from applying to it for permission to file a motion. *Id.* at 459. Accordingly, the district court's order did not deny the objectors due process.

C. *Summary.*

In sum, the district court's class action satisfies all the requirements of Rule 23, and the state and federal constitutions. Moreover, certification of a class action would promote judicial economy in a complex case where such concerns are especially significant. It would protect the interests of defendants by avoiding endless relitigation and inconsistent determinations of their relative liability. And, it would protect the plaintiffs by ensuring prompt determination of liability (thereby promoting settlements) and by guaranteeing that any punitive damage award would be fairly allocated to all plaintiffs. Therefore, I believe that the district court did not abuse its discretion in certifying the class action.

III.

THE DISTRICT COURT DID NOT VIOLATE THE ANTI-INJUNCTION ACT BY CERTIFYING A MANDATORY CLASS ACTION.

The majority recognizes that an opt-out class, which the district court remains free to certify, would not violate the Anti-Injunction Act. Because members of such a class would be free to withdraw and pursue their claims independently in state court, such a class action would not inherently restrict state court proceedings, nor would it afford any basis upon which the district court might enjoin state court proceedings. *See In Re Glenn Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975).

The majority holds, however, that the mandatory class action violates the Anti-Injunction Act because some class members have already initiated state court proceedings and presumably will be enjoined from pursuing such independent actions. *See, supra,* at 1181, 1183. This is a sweeping rule that prohibits certification of an otherwise proper mandatory class whenever a class member has commenced a state court action. In my view, such a rule is not supported by the cases relied upon by the majority and, moreover, is simply the wrong rule in light of the necessary dictates of mandatory class actions.

A mandatory class action, of course, has a restrictive effect on related proceedings in any other court—state or federal. This is because, by definition, members of such a class cannot pursue independent litigation of class claims. *See, e.g., Reynolds* v. *National Football League*, 584 F.2d 280, 283 (8th Cir. 1978). The majority states that a mandatory class only prohibits members from *initiating* independent litigation, citing *Reynolds* v. *National Football League, supra,* for this proposition. *Supra,* at 1180.

Neither *Reynolds* nor any other case cited to this Court supports such a narrow construction of mandatory class actions. Indeed, the implication of the majority's view is that mandatory classes are not truly mandatory—any member who has previously commenced independent litigation is somehow not subject to the ordinary rules of such class actions. In my view, the plain meaning of a mandatory class does not change merely because some members of the class have previously initiated independent actions. If certification of a mandatory class is proper, as here it clearly is, then the ordinary rules of such actions simply preclude independent litigation of class claims in state or federal courts.

This point is important to whether the class action violates the Anti-Injunction Act. Under the Act, an injunction of state court proceedings is proper when it is "necessary in aid of" the federal court's jurisdiction. 28 U.S.C. § 2283. It seems self-evident that an injunction to protect the ordinary scope of a mandatory class action is "necessary in aid of" the federal jurisdiction over such a class.

I must emphasize that no plaintiff has, as yet, been enjoined from pursuing any state court action.[16] Our re-

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[16] The only express injunction entered below is that part of the district court's order which appears to prevent class members from settling their punitive damage claims. Such a restriction is unwarranted and should be modified as noted, *supra*, at note 2. In any event, it is not a necessary part of certifying the mandatory class action and it is unfair to bootstrap from this part of the order to a finding that the class action as a whole violates the Anti-Injunction Act. *See, supra*, at 1180.

view is thus proper, if at all,[17] to the extent that certification of a mandatory class will *necessarily* restrict class members from pursuing pending state court proceedings. The question then is whether such restrictions are "necessary in aid of" the class action jurisdiction.

Here, the necessary restrictive effects of the mandatory class action are twofold. The first restrictive effect is that class members would not be able to pursue a punitive damage claim in an independent action. Such a restriction is absolutely necessary to the district court's jurisdiction over this class issue due to the applicable state law on punitive damages. Although the parties do not agree on the certainty of the state law rule, they do agree that there is a legitimate and reasonable claim that under Missouri law, only the first plaintiff to achieve a judgment would obtain a punitive award—all other plaintiffs would be frozen out. *See, supra,* at 1186. When a mandatory class is necessary to protect all plaintiffs on this claim, it seems obvious that an injunction against independent litigation of the issue is "necessary in aid of" the jurisdiction of the class.

The second restrictive effect of the mandatory class is to, in effect, stay state court proceedings on the issue of

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[17] The district court did not certify any issue for interlocutory appeal. Thus, it would be proper to review, under section 1292(a), only the express injunction before us, *see* note 16, *supra,* and to dismiss for lack of jurisdiction the issue of whether the class action will result in injunctions of state court proceedings. *See generally In Re Glenn Turner Enterprises Litigation,* 521 F.2d 775, 781 (3d Cir. 1975). I recognize, however, that mandatory class actions have an inherent restrictive effect on independent litigation of class isssues. If this fact is to serve as the basis for appellate review, however, such review should focus narrowly on the inherent restrictive effects of the class and should not broadly assume injunctions which have not been entered.

liability for compensatory damages. I emphasize that the plaintiffs are free to settle such claims or to pursue in state court a determination of the amount of such damages, once the class action determines relative liability among the defendants.[18] The mandatory class is necessary to protect the numerous defendants from inconsistent results and extremely burdensome relitigations of their relative culpability and to ensure that serial determinations of liability will not deplete the assets of the defendants. *See, supra,* at 1187-1188. Certification of the compensatory liability issue is also strictly necessary to protect the punitive damage claim noted above because, under ordinary joinder rules, an independent action on liability would necessarily reach both compensatory and punitive issues. Thus, if a mandatory class is to be certified at all, it must include the punitive claim and at least the liability aspect of compensatory damages. In my view, where a mandatory class is properly certified for these purposes, enjoining independent litigation of the class issues is plainly "necessary in aid of" the class jurisdiction.

The majority essentially ignores that it is a mandatory class action we are considering under the Anti-Injunction Act. They cite, for example, *In Re Glenn Turner Enterprises Litigation, supra,* which held that an injunction of state court proceedings was not "necessary in aid of" the federal class's jurisdiction. *Supra,* at 1181. *Turner,* however, involved an opt-out class, not a mandatory one. The standard applied in *Turner* required a determination of whether the class action "can be given its intended scope only by stay of a state court proceeding." *In Re Glenn*

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[18] Thus, the mandatory class does not preclude state court forums for those plaintiffs who believe, for whatever reason, that they might obtain more favorable compensatory damages in state court.

Turner Enterprises Litigation, supra, 521 F.2d at 781. As the *Turner* Court properly reasoned, because the intended scope of an opt-out class permits independent actions, an injunction against such actions cannot be "necessary" to protect the scope of the class. *Id.* The *Turner* Court expressly reserved the issue of mandatory class actions, *id.*, for good reason. The intended scope of a mandatory class precludes independent litigation of class claims, which is why an injunction against such independent actions is "necessary" to give the class its intended scope.

The majority primarily relies on the general doctrine that individual *in personam* actions, conducted concurrently in state and federal courts, do not cause interference with either court's jurisdiction. *Supra,* at 1182-1183. Thus, under the Anti-Injunction Act, an individual *in personam* claim in federal court is not a basis for enjoining other plaintiffs from pursuing similar claims in state court because such an injunction is not "necessary in aid of" the federal court's jurisdiction. *Id.* This rule developed around and applies to independent, *individual* claims, not mandatory class actions. The majority cites to no case in which this general rule has been used to prempt the ordinary application of mandatory class action rules.

Admittedly, the relationship between mandatory class actions and the Anti-Injunction Act appears to present an open question. The approach adopted by the majority, however, broadly forecloses mandatory class actions whenever a class member has commenced state court proceedings. I would agree that class actions should not become a vehicle for circumventing the ordinary relations between state and federal courts. The requirements for a mandatory class action, however, are quite rigorous and, by their nature, will prevent any such trend from developing. More-

over, there are usually strong reasons for certifying the mandatory class here, a procedure which the district court found was essential to fair adjudication of all claims. Such circumstances will not often arise; yet in face of them, the majority has adopted a rule which broadly defeats the purpose of mandatory class action jurisdiction. I do not agree that such a rule is required by the Anti-Injunction Act, nor by any sensible view of the relations between state and federal courts.[19]

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[19] I do, however, agree with the majority that Judge Wright did not abuse his discretion by declining to disqualify himself from this case under 28 U.S.C. § 455(a).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 82-1181/1207 September Term 1981

In Re: Federal Skywalk Cases
Melanie Hanson Johnson, et al,

Petitioners.

In Re: Federal Skywalk Cases
Jacqueline N. Rau,

Appellant.

Appeal from the United States District Court for the
Western District of Missouri

Petition for Mandamus/Application
For ImmediateTemporary Stay

The Court, having considered petitions for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petitions for rehearing and suggestions for rehearing en banc denied. Chief Judge Lay, Judge Heaney and Judge Bright would grant the rehearing en banc. Judge John R. Gibson did not participate in the considerations of the petitions.

The petition for rehearing considered by the panel is also denied.

July 9, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1181 September Term 1981

In Re: Federal Skywalk Cases

In Re: Melanie Hanson Johnson and
Gerard Stanley Johnson, et al,

Petitioners.

No. 82-1207

In Re: Federal Skywalk Cases
Jacqueline N. Rau,

Appellant.

Appeal from the United States District Court for the
Western District of Missouri

Petition for Mandamus/Application
For ImmediateTemporary Stay

Motion for stay of issuance of mandate pending application for writ of certiorari in the Supreme Court of the United States has been considered by the Court and is denied.

Judge Heaney would grant the stay.

July 28, 1982

APPENDIX D

In re FEDERAL SKYWALK CASES.
United States District Court,
W. D. Missouri, W.D.

Jan. 25, 1982.

ORDER AND MEMORANDUM

SCOTT O. WRIGHT, District Judge.

This action arises out of the collapse of two skywalks at the Hyatt Regency Hotel of Kansas City, Missouri on July 17, 1981. Plaintiff, Molly Riley, moves this Court to certify as a class action those claims of business invitees of the hotel who suffered physical, mental or property damage as the result of the collapse of the two skywalks. Several plaintiff-intervenors and defendants oppose class certification for varied reasons. Other defendants have not expressly opposed certification, but have asked the Court to delay its ruling on the motion to certify a class action until all of the parties have had an opportunity to voluntarily resolve their differences through settlement. All interested parties orally argued the motion on December 10, 1981.

On December 24, 1981, plaintiffs-intervenors moved to dismiss the motion for class certification on the ground that plaintiff Riley had failed to join all parties needed for a just adjudication. Ms. Riley, a Kansas resident, did not join two Kansas defendants because she lacked diversity of citizenship as to them. Since two defendants could not be bound by any determinations made at a single trial if Ms. Riley were named as the class representative, plaintiffs-intervenors' motion to dismissher motion to certify is granted. This Court, however, may certify a class action on its own motion. Thus, for the reasons which follow, the Court concludes that the most principled, efficient and expedient manner in which

to conduct the litigation stemming from the tragic events of July 17 is in accordance with the provisions of Rule 23 of the Federal Rules of Civil Procedure. Accordingly, the Court determines that federal court plaintiffs Stover, Vrabel, Grigsby and Abernathey shall represent the class members, certifies a Rule 23(b)(1)(A) class action on the issues of liability for compensatory damages and liability for punitive damages, and certifies a Rule 23(b)(1)(B) class action on the issues of liability for punitive damages and the amount of punitive damages. Finally, the Court permits the individual unnamed plaintiffs to continue to settle their respective claims against any or all defendants.

I. *Summary of Skywalk Litigation*

On July 17, 1981, two skywalks in the central lobby of the Hyatt Regency Hotel in Kansas City, Missouri collapsed killing 113 persons and causing bodily injury to at least another 212 persons. Three days later the first lawsuits were filed in this Court and in the Circuit Court of Jackson County, Missouri. As of the date of this order, approximately 150 lawsuits have been filed in either of these two courts. In anticipation of the deluge of litigation that the skywalk disaster was certain to generate, the state and federal courts moved with alacrity to consolidate their respective cases for pretrial discovery. Liaison committees of plaintiffs' and defense counsel were selected to jointly initiate and conduct pretrial discovery.

Plaintiff Riley initially filed a civil action seeking class certification by the Circuit Court of Jackson County, Missouri on July 31, 1981. On September 1, 1981, Ms. Riley filed a similar action in this Court. In her action in this Court, Riley, a resident of Kansas, did not sue certain Kansas defendants. She dismissed her state court suit on September 24, 1981, and then moved this Court to certify a class action naming her as the class representative of all business invitees who were present at the Hyatt

Regency Hotel when two of its skywalks collapsed. On December 10, 1981, a hearing was conducted to determine whether her motion for class certification should be granted. From that hearing the Court finds the following facts to be true:

1. The collapse of two skywalks in the Hyatt Regency Hotel on July 17, 1981 killed 113 persons and caused bodily injury to at least another 212 persons.

2. A substantial number of persons who were present in the central lobby when the skywalks fell might have suffered emotional distress or might have failed to report their physical injuries.

3. Approximately 150 civil lawsuits have been filed in either this Court or the Circuit Court of Jackson County, Missouri.

4. Those persons who have filed lawsuits presently seek compensatory damage awards in excess of one billion dollars and punitive damage awards in excess of 500 million dollars.

5. The various defendants implicated by these suits are protected by liability insurance coverage in the aggregate amount of 333 million dollars.

6. By way of *in camera* revelation, the Court is cognizant of the approximate net worth of defendants Hyatt Corporation, Hallmark Cards Corporation, and Crown Center Redevelopment Corporation.

7. Numerous minor and some substantial claims have already been amicably settled.

8. The liability insurance carriers have been and are eager to continue to discuss the settlement of any legitimate claim.

After the December 10, 1981 hearing, plaintiffs-intervenors moved to dismiss Riley's motion for class certification on the ground that she failed to join certain parties who are needed for a just adjudication. The Court found merit in the plaintiffs-intervenors' motion to dismiss and, as a consequence, commenced a search of court records in order to determine which federal court plaintiffs could serve as representatives of the class. The Court notices that plaintiffs Stover, Johnson, Vrabel, Grigsby and Abernathey have citizenships diverse from the defendants who have been sued. Only plaintiff Johnson, an intervenor in his action, has recorded opposition to the certification of the class action.

II. *Prerequisites to A Class Action*

The class action device, as contemplated by Rule 23 of the Federal Rules of Civil Procedure, is the proper tool for the accomplishment of principled, efficient and expeditious adjudication of skywalk claims which threaten to expose defendants to repeated trials of the compensatory and punitive damages issues, which threaten to leave many claimants without a practical chance for redress of punishable acts, and which threaten to congest the state and federal courts of this city for many years. This Court views Rule 23 as the key building block in the federal courts' continuing effort to make the civil procedural system more responsive to the needs of contemporary litigation. The magnitude of the litigation spawned by the collapse of two skywalks challenges this Court to administer these cases with flexibility and imagination. While other procedural vehicles might provide adequate guidelines for resolution of the complex issues posed by these cases, the circumstances of this litigation compel this Court to adopt the far superior procedures of Rule 23 for the resolution of the many claims arising out of an unfortunate tragedy.

A. *Diversity Jurisdiction*

The jurisdictional requirements of a conventional civil suit apply to class actions. *See Snyder* v. *Harris*, 394 U.S. 332, 340, 89 S.Ct. 1053, 1058, 22 L.Ed.2d 319 (1969). In the context of a class action, only the citizenship of the named parties is relevant to the determination of jurisdiction. *Id.* Mr. Justice Black stated in *Snyder* that if

> one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State.

Id. at 340, 89 S.Ct. at 1059. Since at least two defendants which have been sued in the course of this litigation are of the same citizenship as plaintiff Riley, Riley cannot serve as the named representative of the class if the Kansas defendants are to be bound by the determinations made at the trial of the class action. As is subsequently discussed, the Court intends to try this lawsuit only once and to bind all parties to the determinations made at that single trial. Thus, Riley will not do as the named representative because her citizenship is not divese from all the opponets of the class.

The citizenships of plaintiffs Stover, Vrabel, Grigsby and Abernathey, howover, are diverse from the citizenships of all the defendants who have been sued. In addition, there appears to be no question that their claims, like the claims of all other members of the class, exceed the $10,000 amount in controversy requirement of 28 U.S.C. § 1332. The Court, therefore, concludes that, with these plaintiffs as the named representatives of the class, diversity jurisdiction exists and that all parties needed for a just adjudication of the issue presented by this suit can be joined.

B. *Rule 23(a)*

Rule 23(a) provides that these plaintiffs may sue as the representative parties of a class of all business invitees present at the collapse of the skywalk if

> (1) The class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Before the circumstances of this case can be analyzed in terms of those four prerequisites, the introductory language of Rule 23(a) implicitly requires two preliminary determinations. First, a class, which is capable of accurate description, must actually exist. *Vietnam Veterans Against The War* v. *Benecke*, 63 F.R.D. 675, 679 (W.D.Mo.1974). The members of the proposed class are readily identifiable. They include all business invitees who were present in the main lobby of the hotel at the moment the two skywalks collapsed. Second, plaintiffs Stover, Vrabel, Grigsby and Abernathey must be members of the proposed class. There does not appear to be any serious question that their claims arise out of deaths and injuries suffered by persons present in the hotel lobby at the time of the skywalks' collapse. If any serious questions do arise, interested parties are obliged to file a motion to decertify.

In addition to satisfying the two preliminary requirements of Rule 23(a), each of the following Rule 23(a) prerequisites have been satisfactory established:

1. Numerosity. Exactly 113 person have died as a result of the collapse of the two Hyatt skywalks. At least

another 212 persons suffered injuries which required hospitalization or treatment at an area hospital on the day of the collapse. In addition, a substantial number of people were present in the central lobby of the hotel when the skywalks fell. Though this latter group of people may not have suffered any physical injuries which required immediate attention, they might have suffered emotional distress as a consequence of the disaster. It has been estimated that a crowd of 1,500 to 2,000 persons were in the lobby of the hotel at the moment of the collapse. A class which includes all business invitees present when the skywalks fell is suffciently numerous to satisfy the requirement that joinder of all members of the class is "impracticable." *Coburn* v. *4-R Corp.*, 77 F.R.D. 43, 44 (E.D.Ky. 1977). Rule 23(a)(1) does not require a showing that joinder is "impossible." A showing of strong litigational inconvenience in the prosecution of claims separately by the proposed class members is sufficient. Thus, the first prerequisite of Rule 23(a) is satisfied.

2. Commonality. The claims of every member of the class arise from the collapse of the two skywalks. With the single exception of the amount of individual compensatory damages, the operative facts concerning each claim are identical. There are no issues of liability or defenses to liability for compensatory damages perculiar to individual members of the class. The issue of liability for punitive damages may require separate treatment of the wrongful death and survival claims. The Court, however, is prepared to provide the distinct treatment through the formation of a subclass composed of wrongful death and survival actions in the event that it is subsequently determined that punitive damages are not awardable to wrongful death or survival claimants. Further, Rule 23(a)(2)

requires only that there be one or more significant common questions of law or fact. It does not require that "all" questions of fact and law be common and must be distinguished from the requirement of Rule 23(b)(3) that common issues predominate. Thus, the commonality requirement of Rule 23(a)(2) is satisfied. *Like* v. *Carter*, 448 F.2d 798, 802 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045, 92 S.St. 1309, 31 L.Ed.2d 588 (1972).

3. Typicality. The claims of the four named plaintiffs reflect the claims of every other member of the class. Plaintiff Stover and her children seek redress for the allegedly wrongful death of her husband and for the alleged serious injuries she suffered as a result of the collapse. Plaintiffs Vrabel and Abernathey allegedly suffered personal injuries, while the Grigsby plaintiffs have sued to recover for the alleged wrongful death of their mother. Though the amount of compensatory damages is unique to each member of the class, the legal or remedial theories advanced by the class representative are the same as those advanced by other unnamed members of the class. Thus, the typicality requirement of Rule 23(a)(3) is satisfied. *Donaldson* v. *Pillsbury Co.*, 554 F.2d 825, 839-30 (8th Cir. 1977), *cert. denied*, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128 (1977).

4. Adequacy. This Court bears an affirmative obligation to ascertain the adequacy of representation and to monitor it throughout the course of the litigation. The duty is grounded on a fairness rationale which recognizes that some class members did not choose this forum or the counsel ultimately selected to shoulder the burdens of this litigation. The adequacy inquiry focuses on the representative parties and the class counsel.

The class representatives are able to act as fiduciaries in protecting class interests and have resources available for the prosecution of the certified claims. They do not have any interest which conflicts with interests of other class members, are not motivated by reasons which are unrelated to the circumstances of the case itself, and hold a very substantial stake in the outcome of the controversy. Some parties have asserted that their interest in settling their cases conflicts with the prosecution of a class action. Their interest in settling their claims, however, is not restricted by this order. The only parties who cannot settle their claims prior to the conclusion of a jury trial of the certified issues are those named as the class representatives. If any of the plaintiffs named as class representatives in this order would want to negotiate the settlement of their case prior to trial, they should notify this Court within ten (10) days of the date of this order.

The Court selects the counsel for plaintiff Riley to serve as lead counsel for the prosecution of this class action. Counsel for plaintiffs Stover, Vrabel, Grigsby and Abernathey may assist plaintiff Riley's counsel. These counsel can adequately represent the members of the class. The lead class counsel have experience in complex litigation and are ably qualified to conduct the proposed litigation. In the estimation of this Court, lead counsel have exhibited sufficient motivation, competence and resources to successfully maintain a class action. The Court also notices that counsel for Stover, Vrabel, Grigsby and Abernathey are able attorneys who have extensive experience in the areas of personal injury law and will grant them ten (10) days from the date of this order to withdraw as assistant class counsel if they would prefer not to serve. In addition to these class counsel, the Court has received numerous offers of assistance from interested attorneys and will grant other interested attorneys an

additional seven (7) days from the date of this order to submit their names for service as class counsel. In light of all of the above, the Court concludes that the four named plaintiffs are adequate class representatives and that the counsel presently selected by the Court can adequately represent the interests of the class.

III. *Maintainable Class Actions Under Rule 23(b)*

Not only must this action meet all the prerequisites of a class action as listed in subdivision (a) of Rule 23, but it must also satisfy at least one of the three sections of subdivision (b) of Ruile 23. Riley initially moved this Court to certify a class action on the issues of liability for and amount of punitive damages under Rule 23(b)(1)(B) and the issue of liability for compensatory damages under either Rule 23(b)(3) or Rule 23(b)(1)(B). While no other plaintiff joined in Ms. Riley's motion to certify a class action, counsel for numerous other plaintiffs either have voiced their support for the utilization of the class action device or have offered their services in the event that a class action is certified. The Court has also received correspondence from individual claimants who have questioned the true motivation of those counsel who oppose class certification and have asked the Court to guard the best interests of all the parties involved. Though some of the defendants have taken the position in this litigation that they cannot lawfully be subjected to multiple punitive damage awards in successive suits, none has moved this Court to certify a class action in order to protect them from multiple punitive damage awards or incompatible standards of conduct. Some defendants, while neither opposing nor supporting certification, have asked the Court to defer its ruling on the motion to certify until all of the parties have had an opportunity to voluntarily resolves their legitimate claims through settlement.

Rule 23(c)(1) directs this Court to determine whether a class action is to be maintained as soon as practicable after the commencement of the action. Since the ruling of this Court does not impinge on the ability of unnamed plaintiffs and defendants to settle their differences, there is no just reason for delay of this decision. Although this Court has denied plaintiff Riley's motion to certify a class because complete diversity was lacking, this Court, nonetheless, enjoys a wide range of discretion in determining whether a class action ought to be maintained, *Senter* v. *General Motors Corp.*, 532 F.2d 511, 520-21 (6th Cir.), *cert. denied*, 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976); *Castro* v. *Beecher*, 459 F.2d 725, 731-32 (1st Cir. 1972), and what issues ought to be certified, *Gardner* v. *Westinghouse Broadcasting Co.*, 559 F.2d 209, 212 (3d Cir. 1977). *See generally, American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). It is this Court's firm belief that the preservation of the collective best interests of all parties concerned with this litigation and the avoidance of wasteful repetitive litigation are best accomplished by trying the issues of liability for compensatory damages, liability for punitive damages and amount of punitive damages only once. To that end, this Court, on its own motion, determines that a Rule 23(b)(1)(A) class action on the issues of liability for compensatory damages and liability for punitive damages, and a Rule 23(b)(1)(B) class action on the issues of liability for and amount of punitive damages must be certified.

A. *Requirements of Rule 23(b)(1)(A).*

Rule 23(b)(1)(A) directs the Court to consider whether multiple individual suits aimed at determining any or all defendants' liability for compensatory and punitive damages would have an adverse effect on those defendants.

The subdivision provides that a class action may be maintained if the prosecution of separate actions by individual members of the class would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Thus, in order to consider Rule 23(b)(1)(A) as a proper vehicle for resolving the liability issues, there must be a risk that separate actions will, in fact, be tried if a class action is not certified.

Given the nature of the personal injury and punitive damage claims filed in this litigation, this Court would be embarking on utter naivete if it concluded that there was not a substantial likelihood of multiple suits being tried. *See Hernandez* v. *Motor Vessel Skyward*, 61 F.R.D. 558, 561-62 (S.D.Fla.1974), *aff'd* 507 F.2d 1278 (5th Cir. 1975). Not all claimants will be mollified by the amounts offered in settlement, since they have expressed an avowed determination to try to punish those defendants, if any, which were responsible for the tragic events of July 17. While this Court wholeheartedly encourages the continued settlement of legitimate claims, and is mindful that the vast majority of claims may be settled, it cannot, in good conscience, allow a minority of claimants to take any or all defendants to trial time and time again until a compensatory or punitive damage judgment is obtained. *Hernandez, supra* at 561.

Though no defendant has expressly moved this Court to certify a Rule 23(b)(1)(A) class action in order to protect it from successive punitive damage awards or from inconsistent adjudications on the liability issues, the Court believes that Rule 23(b)(1)(A) certification is necessary as a ready and fair means of achieving unitary adju-

dication. *See,* Advisory Committee Comments, 39 F.R.D. 98, 100 (1966). *See also Hernandez, supra* at 560. One or more of the defendants risk being faced with incompatible standards of conduct if varying or inconsistent adjudications with respect to individual members of the class were obtained on the issues of liability for compensatory or punitive damages. *Coburn* v. *4-R Corp.,* 77 F.R.D. 43, 46 (E.D.Ky. 1977); *Hernandez, supra* at 561. As in the case at bar, the defendants in the *Hernandez* case objected to the certification of a class action on the ground that certification would prevent the amicable settlement of legitimate claims. *Id.* at 559 n. 3. The *Hernandez* court did not allow the settlement process to continue because of the limited fund available to pay compensatory damages, but certified the class in order to avoid a multiplicity of suits and inconsistent or varying adjudications. *Id.* Unlike the circumstances facing the *Hernandez* court, in the case at bar, there is no evidence of a limited fund with respect to the payment of compensatory damages. Thus, the settlement of claims for compensatory damages may continue.

Since a Rule 23(b)(1)(A) class action on the issues of liability for compensatory and punitive damages offers economy of effort and uniformity of result without imposing undue debilitation of the procedural or substantive safeguards of members of the class or of persons defending against the class action, this Court concludes that a Rule 23(b)(1)(A) class action on the issues of liability for compensatory and punitive damages must be certified.

B. *Requirements of Rule 23(b)(1)(B).*

Rule 23(b)(1)(B) provides for class treatment in cases in which separate suits might have undesirable effects on the class members. The passage states that a class action might be maintained if individual actions would create

a risk of individual adjudications that "would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests." While Rule 23(b)(1)(A) focuses on the possible prejudice to the party opposing the class, Rule 23(b)(1)(B) focuses on the ability of the individual members of the class to protect their interests if other class members brought separate actions. It is quite common for suits brought under Rule 23(b)(1) to meet the tests of clause (A) and clause (B) of that provision. *See generally* 7A Wright and Miller, Federal Practice and Procedure, § 1772 n. 72 (1972 & Supp.1981). So long as a class action is maintainable under Rule 23(b)(1), nothing turns on which clause is controlling. *Id.* at § 1772.

Rule 23(b)(1)(B) most often applies to cases that involve multiple claims to a fund which may be insufficient to satisfy all the claims. *See, e.g., In re "Dalkon Shield" Litigation,* 526 F.Supp. 887 (N.D.Cal., 1981); *Coburn* v. *4-R Corp.,* 77 F.R.D. 43 (E.D.Ky.1977); *Hernandez* v. *Motor Vessel Skyward,* 61 F.R.D. 558 (S.D.Fla.1974), *aff'd,* 507 F.2d 1278 (5th Cir. 1975). Where a limited fund exists, individual members of the class face a very real risk that the winner of the race to the courthouse might be awarded all of the monies available. Though the availability of sufficient funds to cover the claims for compensatory damages is not presently in question, there is a question as to whether sufficient funds are available to pay awards of punitive damages.

At the present time, the funds available to pay for punitive damages appear to be limited. For example, the continued payment of compensatory damages necessarily depletes the resources of the defendants who continue to settle claims against them. Second, there is the possibility

that few, if any, defendants will be found liable for punitive damages. No defendant has unlimited assets and most do not have sufficient assets to warrant a sizable punitive damage award. Finally, there is some uncertainty under Missouri law as to whether a single defendant can be liable for more than one award of punitive damages. *See Monsanto Co.* v. *Parker*, No. 43829 (Mo.App., E.D., argued Dec. 9, 1981). If a defendant can only be punished once, then the first claimant to get an award is the first and only winner. The Court is not inclined to permit the sacrifice of one aggrieved party's claim for the sole benefit of another aggrieved party.

Because of the uncertainty under Missouri law as to whether a single defendant can be liable for more than one award of punitive damages, the plaintiffs who have intervened move this Court to abstain from ruling on the motion for class certification until after a Missouri appellate court has resolved the question. It is this uncertainty, however, which requires this Court to refrain from abstaining. So long as the question is unsettled, the spectre of a limited fund remains. Even after that particular question is resolved by the courts of Missouri, the possibility of a limited fund might still exist. The Court, therefore, denies the intervenors' motion to abstain from certifying a Rule 23(b)(1)(B) class action.

It is the primary concern of this Court that legitimate claimants receive recompense for the actual damages that they have suffered. Because of this overriding concern, the Court will permit the continued settlement of claims even though each settlement diminishes the funds available to pay for punitive damages. Though the Court considers an award of punitive damages secondary to compensation for actual damages, a claimant's interest in exacting punishment against a deserving defendant is

recognized by the law and must be protected. Only a single class-wide adjudication of the issues of liability for and amount of punitive damages can protect the interest of every victim in receiving his or her just share of any punitive damage award.

There is one final consideration that indirectly bears on this Court's decision to certify a Rule 23(b)(1)(B) class action. Those counsel who presently represent more than one client and who have sought punitive damages on behalf of each of those clients face a potential conflict of interest. In the context of a limited fund, an attorney who represents more than one client may be put in a conflicting position when forced to decide which case to proceed with first. *See* Disciplinary Rule 5-105(B) and Rule 5-105(C). The interests of one client may ultimately be sacrified for the benefit of another client. Even if a limited fund did not exist, if Missouri law precludes multiple awards of punitive damages against a single defendant, the same result obtains. Plaintiff-intervenors assert that the conflict is readily resolved through full disclosure to their clients and eventual settlement of their cases One of the attorneys for the intervenors, however, admitted at the class certification hearing that he had not disclosed the potential conflict to his clients. The Court further believes that counsel who represent more than one client may still be in a position of conflict if they must advise their clients to settle in order to insulate themselves from a conflict of interest on the punitive damages claims. The Court is mindful that counsel must always avoid even the mere appearance of impropriety.

Thus, since a class-wide resolution of the punitive damages issues protects not only the class members from the spectre of an exhausted fund, but may also resolve the potential conflicts of interest faced by counsel who represents more than one punitive damage claimant, the Court

deems it wholly appropriate to certify a Rule 23(b)(1)(B) class action on the issues of liability for and amount of punitive damages.

IV. *Intervenors' Motion to Disqualify*

On January 19, 1982, the plaintiffs-intervenors filed a motion, in accordance with 28 U.S.C. § 455, in which they asked the Court to disqualify itself from the skywalk litigation on the ground that its impartiality might reasonably be questioned. The motion is presumably generated from a series of conversations which counsel for the intervenors engaged in with counsel for plaintiff Stover.

In the course of evaluating the issues raised by the certification of a class action in the skkywalk litigation, the Court commenced a survey of its records to determine which plaintiffs, who have filed suit in this Court, could serve as representatives of a class action. The Court noticed that plaintiffs Stover, Johnson, Vrabel, Grigsby and Abernathey could serve as class representatives. Ccurt records reflected that only plaintiff Johnson, an intervenor and an initiator of the disqualification motion, is fervently opposed to the certification of a class action. With respect to the other four parties, the Court noticed that its records did not indicate what positions these parties held concerning the certification question. Before naming these parties as class representatives on the Court's own motion, the Court deemed it courteous to inquire as to their respective positions. To that end, the Court first contacted counsel for plaintiff Stover.

Counsel for plaintiff Stover were informed that the Court was contemplating naming their client as one of the representatives of the class action if the Court decided to certify a class action. The Court inquired as to their position on the certification issue. Counsel for Stover

were not able to give the Court an immediate answer and advised the Court that they could publish their client's position within ten days as they were scheduling a settlement conference with defense counsel.

Before the Court was able to inquire about the respective positions of the other three parties, counsel for the intervenors moved this Court to disqualify itself from the skywalk litigation, alleging that the Court's survey had given plaintiff Stover an advantage in settling her case and, thus, raised the question of whether the Court's impartiality might reasonably be questioned. Though this Court, to whom the motion to disqualify was addressed, presumably knows more about the factual background of its involvement in matters that form the basis of the motion than do the movants, *Laird* v. *Tatum*, 409 U.S. 824, 824 n. 1, 93 S.Ct. 7, 8 n. 1, 34 L.Ed.2d 50 (1972) (Memorandum of Mr. Justice Rehnquist), the Court considers the motion as if the allegations are true.

The intervenors have alleged that this Court informed counsel for Stover that a class actions would be certified, that Stover would serve as the representative of the class members and that an order certifying a class action would not be issued on January 15, 1982. The intervenors further allege that plaintiff Stover gained an advantage not available to the intervenors because she knew that she did not have to settle her case before January 15, 1982 and that she could pressure the defendants into paying her a premium to keep her from becoming a class representative.

Assuming that all of these allegations are entirely true, even though they are not, the Court must scrutinize its impartiality as a judicial officer under Section 455(a) which provides that this Court shall disqualify itself from any proceeding in which its "impartiality might rea-

sonably be questioned." 28 U.S.C. § 455(a). While disqualification is certainly not automatically required merely upon the filing of an affidavit, *Mavis* v. *Commercial Carirers, Inc.*, 408 F.Supp. 55, 61 (C.D.Cal.1975), it is incumbent on this Court to determine whether this is a proceeding in which its impartiality might be questioned. The standard of general disqualification is one of reasonableness and is not interpreted to include a "spurious or loosely based charge of partiality." *Mavis, supra*, at 61. The 1974 amendments to 28 U.S.C. § 455 codified Canon 3 C of the American Bar Association Code of Judicial Conduct. In so providing, Congress cautioned:

> While the proposed legislation would remove the "duty to sit" concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might reasonably be questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.
>
> At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choosing.

H.R.Rep. No. 93-1453, House Judiciary Committee, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Ad. News, 6351, 6355 (emphases in original).

In applying the objective standards established by Congress in Section 455(a), the Court finds the legislative history enlightening. The decisions of other courts that have faced disqualification motions provide some guidelines, *see* Federal Judicial Conference, *Decisions Construing the Judicial Disqualification Statute* (1977), but those decisions, unlike decisions governing other issue of law, cannot directly bear on the question that this Court must resolve. *Bradley* v. *Milliken*, 426 F.Supp. 929, 934 (E.D. Mich.1977). Even though introspection might dictate disqualification or qualification where other judges, who necessarily have incomplete knowledge, could reach alternative conclusions, the cases construing Section 455(a) illustrate the wisdom of having this judge resolve, in the first instance, the question of his own disqualification. *Id. citing United States* v. *Mitchell*, 377 F.Supp. 1312, 1323 n. 8 (D.D.C.1974) (Sirica, C. J.). The legislative history implies the same.

The intervenors assert that this Court was no longer impartial in this case when it inquired as to the position of plaintiff Stover on the issue of class certification. According to intervenors, plaintiff Stover gained an unfair advantage in the settlement of her claims. The advantage was presumably gained through knowledge that an order certifying a class action would not be issued on January 15, 1982. The Court has never imposed a deadline for the issuance of any of its orders in any case. The intervenors do not point to any evidence which demonstrates that the Court had bound itself to resolve the class certification on any particular date. The Court had anticipated resolving the certification issues and setting the discovery schedule by mid-January, but a series of motions filed by the intervenors concerning the certification issue have been filed throughout the month of January. Each of these required and have received the Court's attention.

The Court, mindful of the great importance of these suits to the people of Kansas City, has tried to process the motions filed in this case as fast as practicable and will continue to do so.

Intervenors have not, and cannot, show that this Court had guaranteed that an order would be filed on January 15, 1982, or that the merits of this case were discussed with anyone. Thus, all parties "labored" under the same "supposed" disadvantages. The intervenors assert that they were facing the pressure of a January 15, 1982 settlement deadline. As previously stated, the pressure was self-generated and based on speculation rampant in the legal community. The intervenors had no knowledge of when an order would be issued and did not know what this Court's position would be with respect to the continued settlement of their cases. As this order makes clear, the fear that settlements would be halted by this Court did not materialize. The intervenors likewise assert that the defendants would cease negotiating settlements when an order was issued. The settlement postures of each defendant have not been hampered by this Court and are controlled by the defendants.

It is finally argued by intervenors that plaintiff Stover, knowing that she might be selected as a class representative, could pressure the defendants into a lucrative settlement. This argument presumes that the able defense counsel of this community are susceptible to such pressure and that they would want to "buy-off" a potential class representative. While intervenors are to be commended for asserting the interests of those defendants presently engaged in the settlement process, they have not shown that Stover received more for her claim than her claim was worth. In fact, her case was not settled. As the discussion of the allegations suggests, the intervenors, in an attempt to avoid a potentially adverse deci-

sion, have fashioned these supposed disadvantages out of the winds of speculation.

The Court is alert to the possibility that those who challenge its impartiality are in fact seeking to avoid the consequences of an adverse decision. Though the Court was never sure of what ruling it would make until this order was drafted and entered, the Court did intimate at the December 10, 1981 certification hearing that it was impressed by the availability of the class action device in the skywalk suits. The intervenors, in the representation of their clients' interests, have been the most vocal opponents of class certification. While the Court applauds their zealous representation, it cannot ignore the fact that intervenors truly want to avoid the consequences of an adverse decision and would welcome the opportunity to relitigate the certification issue before another judge. The Court is also cognizant that no active judge in residence of the Western District can accept responsibility for presiding over this case by reason of their previous disqualification due to conflicts of interest.

Even if every allegation made by the intervenors was founded on the truth, this Court concludes that a reasonable person, after considering all of the circumstances, would not question the impartiality of this Court. Thus, the intervenors' motion to disqualify this Court from the continued conduct of this litigation is denied.

V. *Conclusion*

In order to expeditiously adjudicate the issues raised by this skywalk litigation with a minimum of repetition, expense and delay, the Court firmly believes that the creation of a Rule 23(b)(1)(A) class action on the issues of liability for compensatory and punitive damages, and a Rule 23(b)(1)(B) class action on the issues of liability for

and amount of punitive damages best serves the diverse interests of both plaintiffs and defendants. Legitimate claimants may negotiate and execute settlement agreements with those defendants who have vociferously urged this Court to allow the settlement process to continue. Those claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damage issues.

Accordingly, it is hereby

ORDERED that the motion to disqualify is denied. It is further

ORDERED that plaintiff Riley's motion to certify a class action is denied. It is further

ORDERED that a class action is certified and that plaintiffs Stover, Vrabel, Grigsby and Abernathey shall serve as the representatives of the class. It is further

ORDERED that counsel for plaintiff Riley shall serve as lead counsel and that counsel for plaintiffs Stover, Vrabel, Grigsby and Abernathey shall assist lead counsel. It is further

ORDERED that other interested attorneys who would like to be considered as counsel for the class and who have not previously informed this Court of their position have until seven (7) days after the date of this order to submit their names for service as class counsel. It is further

ORDERED that the intervenors' motion for interlocutory appeal is denied. It is further

ORDERED that the intervenors' motion for abstention is denied. It is further

ORDERED that discovery be completed by July 1, 1982, and that the trial of this action be commenced on August 15, 1982.

APPENDIX E

28 U.S.C. § 2072 provides:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

APPENDIX F

Federal Rule of Civil Procedure 23.

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if 1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advice each member that

(A) the court will exclude him from the class if he so requests by a specified date;

(B) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment is an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate

(A) an action may be brought or maintained as a class action with respect to particular issues, or

(B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action,

that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX G

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT OF THOMAS P. SULLIVAN

Thomas P. Sullivan, on oath, certifies that the matters contained on pages 4 and 10 to 12 of the attached brief are true.

_____

Thomas P. Sullivan

Subscribed and Sworn to before me this ..... day of ....., 1982.

_____

Notary Public

No. 82-626

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JACQUELINE N. RAU,
Conditional Cross-Petitioner,

v.

SHIRLEY STOVER, et al.,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF JACQUELINE N. RAU

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Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF JACQUELINE N. RAU

ARGUMENT

I.

THE EIGHTH CIRCUIT ERRONEOUSLY SANCTIONED JUDGE WRIGHT'S SOLICITATION OF CLASS REPRESENTATIVES AND FRUSTRATION OF MS. RAU'S EFFORTS TO BE HEARD.

[Reply to Brief in Opposition at 7.]

Although the Eighth Circuit correctly stated the standard for review of disqualification rulings, it did not apply that standard. Instead, the court relied on facts which caused it to conclude "that Judge Wright certified the class based solely on

his judgment that such action would best serve the interests of all parties involved." App. A, 18a. Judge Wright's true motive is irrelevant. However, his prejudicial acts constitute an abuse of discretion justifying this Court's review on the merits of the Eighth Circuit's decision. *See, United States* v. *Nobles*, 422 U. S. 225, 241-42 n. 16 (1975).

Judge Wright's improper efforts to preserve the putative mandatory class continue even today and further demonstrate his abuse of discretion. On September 30, 1982, Shirley Stover testified that by settling her case she intended to abandon her individual claim before this Court. App. H, 76a, 79a, 83a-86a.* Judge Wright stated that he had no "reservation about [Ms. Stover's settlement] being in any way improper." App. H, 105a. Yet, at the urging of counsel for the putative class, Judge Wright refused to approve Ms. Stover's settlement unless defendants agreed not to raise the issue of mootness before this Court. App. H, 89a-90a, 92a-94a, 96a-99a. Judge Wright thereby abrogated defendants' right to bring relevant new facts to the attention of this Court and Ms. Stover's right to finalize a proper settlement.

II.

THE MANDATORY CLASS ACTION CERTIFIED BY THE DISTRICT COURT DENIES CLASS MEMBERS DUE PROCESS OF LAW, VIOLATES RULE 23, AND IS AN INAPPROPRIATE PROCEDURE FOR MASS TORT LITIGATION.

[Reply to Brief in Opposition at 4-7.]

The putative class representative erroneously asserts that Ms. Rau has no standing to challenge the validity of the class

* The September 30, 1982 hearing before Judge Wright was not transcribed by the filing deadline for Ms. Rau's conditional cross-petition. Pursuant to Ms. Rau's order, the 101 page transcript was delivered to her counsel on October 28, 1982. Appendix H to this brief contains pertinent excerpts from that transcript.

because she does not seek review of an adverse ruling. This argument and the supporting cases cited by the class are inapposite, because Ms. Rau's appeal challenging the validity of the class under Fed. R. Civ. P. 23 was unsuccessful.

The Eighth Circuit did not rule on Ms. Rau's contention that the skywalk cases should not be handled as a class action. Rather, it only held that the district court's injunction against state court proceedings was improper. App. A, 2a n. 4, 19a. Ms. Rau's arguments that class certification was improper would, if accepted by this Court, alter the Eighth Circuit's decision and mandate. Therefore, she must raise these arguments in a cross petition in order for this Court to consider them. *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 381 n. 4 (1970); *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 61-62 n. 11 (1975); *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 560 n. 11 (1976).

The issue of the propriety of a class action in the context of this case is an important question of federal law which has not been, but should be, settled by this Court, if it should consider this case at all. On other occasions, this Court has granted a petition for a writ of certiorari to decide questions concerning the application or interpretation of the Federal Rules of Civil Procedure. *E.g., Provident Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 107 (1968). Furthermore, the issues raised by the petition are so interrelated with the issues raised by Ms. Rau in her conditional cross-petition, that the sound administration of justice suggests that all of these issues should be considered now, if this Court considers any of them.

CONCLUSION

Conditional Cross-Petitioner, Jacqueline N. Rau, strenuously opposes this Court's grant of certiorari in this case for the reasons set forth in her Brief in Opposition. But she respectfully requests that this Court grant her conditional cross-petition for certiorari if this Court grants the petition for certiorari of Shirley Stover *et al.*, No. 82-217.

Respectfully submitted,

November 1, 1982

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SUPPLEMENTAL APPENDIX

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

For the Western District of Missouri

Western Division

Shirley Stover, et al.,
Plaintiffs,

vs.

Crown Center Redevelopment Corporation, et al.,
Defendants.

No. 81-0753-CV-W-5

TRANSCRIPT OF PROCEEDINGS

On Thursday, September 30, 1982, the above-entitled cause came on for hearing before the HONORABLE SCOTT O. WRIGHT, and sitting in Division No. 5 of the above court at Kansas City, Missouri.

APPEARANCES

For the Plaintiffs:

Mr. Robert L. Collins
Robert L. Collins & Associates
2800 Louisiana Street
Houston, Texas

[2] APPEARANCES
(Continued)

For the Defendant Hyatt Corporation:

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911 Main Street
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For the Defendants Crown Center & Hallmark Cards, Incorporated:

Messrs. Lawrence M. Berkowitz and
Robert L. Driscoll
Stinson, Mag & Fizzell
2100 Charter Bank Center
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Kansas City, Missouri

For the class action plaintiffs:

Mr. Paul M. Wolff
Williams and Connolly
839 Seventeenth Street, N.W.
Washington, D. C.

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• • • • •

[23] hospital records indicates that the fractures that you previously described actually extended over an area of at least 18 inches up and down your leg so that there were multiple and many fractures, correct, ma'am?

A. Yes.

Q. It was necessary for the surgeons and physicians there at Truman Medical Center to be involved in more than one surgical procedure to attempt to save your leg; correct?

A. Yes.

Q. And those procedures, among other things, involved the removal of substantial amounts of supporting tissue, as you have described, and also the securing of the bones through nails, plates, and other surgical devices, correct?

A. Yes.

Q. And we're pleased, all of us here, to find that today you have the use of that leg and you were able to walk in this courtroom this morning, were you not, ma'am?

A. Yes.

Q. All right. And in addition to the injuries of your leg, you had the other problems that you have described to the Court with regard to your foot and so forth?

A. Yes.

Q. All right. This is usually an impolite question to ask [24] a lady, but just so we're correct on this, what is your birth date and age, ma'am?

A. January 15th, 1935, and I'm 47.

Q. All right. And you understand, as Mr. Berkowitz inquired, that there are many, many defendants that have been sued in this litigation and you have brought suit against not

only my client, Hyatt, but also against Crown Center, Hallmark and many other defendants, and as a result of what you're asking the Court to do here today you would settle as to all defendants and everyone that was involved at the building of that hotel and in the Hyatt hotel itself; correct, ma'am?

A. Yes.

Q. Further, there are various matters that are pending before this court and there is even an appeal to the United States Supreme Court by way of a writ of certiorari it's called. First of all, do you understand that today when you do this you do it with a note of finality and that all matters that you would be involved in, whether they be appeal proceedings for approval before this court or otherwise, are disposed of from your standpoint?

A. Yes.

Q. All right. And so when you approve this settlement you [25] are no longer authorizing or seeking any relief in this court or by way of appeal to the Supreme Court or any other place, correct?

A. Yes.

Q. All right. And did you authorize an appeal to the Supreme Court, ma'am?

A. I don't know how to answer that.

Q. Do you know if you did? Do you recall doing that?

A. No.

Q. All right. Now, there are—there is also a question in the law, we have a type of damages that's damages other than what we call compensatory damages. The type of damages that would pay you for your leg we call compensatory damages. There is another concept in the law called punitive damages and the purpose being to try to punish people for wrong

conduct or deter them from wrong conduct. You understand that if this settlement is approved today you would waive any claim that you might have to those type of damages as well as the damages that would lie for your husband's death or your injuries?

A. Yes.

Q. All right. And finally, ma'am, you understand that by your settlement today you are also waiving any claim that you might have as part of a group or a class to [26] proceeds or settlement funds?

A. Yes.

MR. WALDECK: All right. Thank you very much, ma'am.

MR. COLLINS: Your Honor, if I might, I have just a couple of more questions.

THE COURT: All right.

REDIRECT EXAMINATION by Mr. Collins:

Q. Mrs. Stover, your daughter, Chris, who is your soon to be 17-year-old daughter, is here in the courtroom today; is that correct?

A. Yes.

Q. You have discussed in detail with her, as well as I have, the terms of this settlement agreement and she has indicated to you that she wishes for you to request approval by the Court of the settlement; is that correct?

A. Yes.

Q. Both you and Chris have been treated by clinical psychologist Dr. George Chance; is that correct?

A. Yes.

Q. And Dr. Chance, has he indicated to you that it would be in your best interests to discontinue your activity in this particular litigation?

A. Yes.

* * * * *

[40] representative. I understand that this matter is very complex and quite serious and I am informed that several attorneys have been appointed by the Court to represent the class, one of whom is my children's and my attorney, Robert L. Collins, of Houston, Texas. I will assist Mr. Collins and the other attorneys to my best abilities and intend to see this matter to its final resolution.

MR. WOLFF: Thank you very much.

Q. [By Mr. Wolff] That is followed by your signature and a notation that it is sworn to you on February 15th, 1982?

A. Yes.

MR. WOLFF: I offer this in evidence, Your Honor.

THE COURT: All right. Any objection?

MR. COLLINS: I have no objection, Your Honor.

MR. WALDECK: None, Your Honor.

THE COURT: All right. Plaintiffs' Exhibit No. 1 will be admitted.

[Plaintiffs' Exhibit No. 1 was received in evidence.]

Q. [By Mr. Wolff] Let me go back to another matter, Mrs. Stover.

[41] As I earlier asked you, a decision was made to seek a new class after the court of appeals decision and you agreed that you would be class representative.

A. Yes.

Q. Is it your decision now that upon settlement of this litigation with the defendants on your own individual behalf that you will dismiss your complaint, including your allegations that you will be class representative?

A. Yes.

Q. And that you are asking the Court not only to dismiss your individual complaint but the class complaint that you have brought?

A. Yes, with me as the representative.

Q. Now, as I asked you earlier, as we discussed, you are aware of the fact that there is presently pending in the Supreme Court, under your name on behalf of the earlier class, an appeal, which is called a petition for writ of certiorari?

A. You're asking me if I am aware of that?

Q. Yes.

A. Yes.

Q. And that appeal is filed as a petition of Shirley Stover individually and as class representative. You're aware of that?

A. Yes.

[42] Q. Is it your decision today that if you settle individually on behalf of yourself and your family that you will move in the Supreme Court to dismiss your petition for certiorari?

A. Yes.

Q. And you have discussed with your lawyer that you will make such a motion of dismissal?

A. Yes.

Q. In discussing the settlement of your case and the case of your family members did Mr. Collins discuss with you what obligations, if any, you had as class representative?

A. Would you repeat that, please?

Q. Yes, I will. You obviously had many discussions with Mr. Collins about what has become the proposed settlement of your litigation.

A. Yes.

Q. During the course of those conversations did you and Mr. Collins discuss at any time what obligations, if any, you had as class representative, either in the action in the Supreme Court or in the action presently in this court?

A. Do you mean as far as my being responsible for—I don't quite understand the question. I don't know if [43] I'm just being dense or what.

THE COURT: No. No, you're not. It's difficult to understand. You go ahead and explain it to Mrs. Stover. You're definitely not being dense. You're pretty smart.

THE WITNESS: Thank you.

Q. [By Mr. Wolff] Mrs. Stover, as you state in your affidavit, and as I'm sure you knew when you took on the role as class representative, that you were representing not only yourself and your family but many other people who were affected by the disaster?

A. Yes.

Q. And as class representative you were not—you were their spokesperson?

A. Yes.

Q. And actions you took affected not only you and your family but them?

A. Yes.

Q. And that if you did something one way or another it might possibly affect not only you and your family but also these other class members?

A. Well, I suppose it could. I don't quite understand what I would have done.

Q. In discussing this settlement did Mr. Collins and you have any discussions about what your actions would have [44]

with respect to the new request for class certification that was filed on your behalf in this court?

A. I don't think so.

Q. Did he tell you at any time if you dismissed your case in this court how it may or may not affect other people?

A. He said there might be a difficulty in getting another class representative. Is that what you mean?

Q. I don't mean anything. I just want to know what was the conversation between you and Mr. Collins about the effect of your dismissal of this case upon the class members?

A. He mentioned to me that there might be a difficulty in obtaining another class representative if I would settle, and I—that's when I had told him I would go ahead as representative but I preferred not to. That's about it, I think.

Q. Did he tell you if you settled and moved to dismiss your petition for certiorari what effect that would have on the other people whom you represented in that Supreme Court action?

A. He may have told me. I can't recall anything specific at the moment.

Q. Did Mr. Collins tell you whether in any discussions he had had with any of the defense counsel, the people on [45] the other side, had mentioned that if there was going to be a settlement they wanted you to drop your case in this court?

A. If there was going to be a settlement—

Q. You were to drop your case in this court?

A. I would assume that would naturally follow. Am I not understanding you correctly?

Q. You are understanding me fine.

Did he tell you specifically whether any of the people representing the defendants told him that you must drop your case if you wanted to settle?

A. I don't remember that he said anyone specifically said that.

Q. But did he say as a group that they said it?

A. I'm not sure. I don't really know.

Q. Did Mr. Collins tell you that any individual or the lawyers for the defendants as a group wanted, desired, insisted, any of those, that you drop your case in the Supreme Court if there was going to be a settlement?

A. I don't remember that he did.

Q. Did Mr. Collins tell you that if there was going to be a settlement you would drop your case in the Supreme Court?

A. Yes.

Q. Did he tell you if there was going to be a settlement [46] you would drop your case in this court?

A. Yes.

Q. Do you recall when Mr. Collins told you those two things? Was it a month ago, two weeks ago, yesterday, this morning?

A. I would assume it was two weeks ago on the phone. I—I guess I wasn't taking very good notes.

Q. Have you ever heard the term fiduciary duty?

A. I believe I have. I don't know exactly what it means.

Q. Have you heard it in the course of this litigation?

A. I'm not sure.

Q. Did Mr. Collins ever tell you that you had fiduciary duties to the other members of the class on whose behalf you acted?

A. No.

Q. Did Mr. Collins ever explain to you if you dismissed your petition in the Supreme Court what would happen to other people whose interests you represented?

A. Not specifically.

Q. Did he generally tell you what would happen to the other people whose interests you represented if you dropped your matter in the Supreme Court?

A. The only thing I can think of is that he said there might be trouble getting another class representative, some people might not be represented.

[47] MR. WOLFF: No further questions, Your Honor.

MR. COLLINS: I have a few questions if I might, Your Honor.

THE COURT: All right.

FURTHER REDIRECT EXAMINATION by Mr. Collins:

Q. Mrs. Stover, when Mr. Wolff was questioning you about dropping your case or dismissing your case, either in this court or in the Supreme Court, your answer was concerning your case individually; is that correct?

A. Yes.

Q. As a matter of fact, you and I had many discussions prior to—over the weekend and several days before the weekend prior to the hearing of September 13th before this court concerning the second application for certification of a class action; is that correct?

A. Yes.

Q. Those discussions centered for the most part around the settlement discussions that I had been having with the defendants and the request by both myself and other class counsel that even if you settled your claims individually that you would continue as class representative; is that correct?

A. Yes.

Q. As of the hearing of September 13th, which was a Monday following the Thursday and Friday after you agreed to

[48] settle your case, as of that time did you still offer and intend to offer to serve as class representative should the Court desire you to serve in that capacity and should the Court certify a new class action?

A. Yes.

Q. Was it your understanding that the following day, September the 14th, Mr. Younger, who is Mr. Wolff's partner, informed me that he, Mr. Younger, and Mr. Wolff had determined that your offer to serve in that capacity was rejected and that they did not desire to present to the Court you as an alternative for class representative in the new class that was being proposed?

A. Yes.

Q. At that time did you make a determination that you no longer wished to even make the offer to be class representative, since you had been rejected and since you truly desired to settle your claims and put all of this matter behind you?

A. Yes.

Q. As a matter of fact, prior to that time, based on your discussions with your psychologist and family members and others who advise you, you really didn't want to continue as class representative but you offered to do so for the benefit of those persons who might comprise [49] the class; is that correct?

A. Yes.

Q. But when you were rejected by Mr. Younger and Mr. Wolff, you no longer desired to act in that capacity?

A. Yes.

Q. Clearly though, as of the time of the hearing of September 13th before this court, your understanding was that you were settling or going to ask the Court to approve the

settlement of your individual claims and the individual claims of your children but that you continued to offer to serve as class representative?

A. Yes.

Q. You and I specifically discussed that there was not any agreement on our part, as a part of the terms of this settlement agreement, that you would refuse to serve as class representative, didn't we? I explained to you, in other words, that we specifically had not agreed nor discussed with the defendants a refusal on your part to serve as class representative as a part of this settlement?

A. Yes.

Q. The affidavit that you earlier executed and that was filed with the court indicated to the extent that you are able you will serve the class. Do you feel that you are able emotionally and psychologically and that [50] your children are able emotionally and psychologically to continue to serve as class representatives?

A. No.

Q. Do you believe that it would be detrimental to your best interests, both psychologically and emotionally, and to the best interests of your minor child Chris and your adult children, to continue involvement in this litigation in any fashion?

A. Yes.

Q. Do you have any objection to the action pending before the Supreme Court, on behalf of the class action, continuing to be pursued by class counsel, that is, the class action that—question that is pending before the Supreme Court and the application for certiorari has been discussed?

A. Do I have any objection to it, did you say?

Q. Yes, ma'am. That is, that the class action issue be pursued, not your individual issues?

A. No, I have no objection.

Q. We have not, as a matter of fact, discussed that we will move—that is, you and I will move in the Supreme Court, for a dismissal of the application for writ of certiorari pending as to the class action issues?

A. No.

[51] Q. What we have discussed is that your individual claims would be dismissed in all courts; is that correct?

A. Yes.

Q. Have you ever been interviewed or discussed this case or received any correspondence concerning this case from Mr. Wolff, Mr. Younger, anyone with Williams and Connolly, or any other law firm or attorney anywhere?

A. No.

Q. The only person that you have ever had any contact or dealings with has been myself; is that correct?

A. Yes.

Q. The only person that you have any agreements with concerning expenses or attorneys' fees is myself; is that correct?

A. Yes.

Q. You have specifically understood that you would not have a liability for any of the class action expenses and that those expenses would be borne by the attorneys who were paying the expenses; isn't that correct?

A. Yes.

[Plaintiffs' Exhibit A was marked for identification.]

MR. COLLINS: May I approach the witness, Your Honor?

THE COURT: Yes.

* * * * *

[56] You may step down, Mrs. Stover. Be careful there, now.

[The witness was excused.]

MR. COLLINS: Your Honor, the plaintiff moves for approval by the Court of the settlement as described. We have prepared in conjunction with the defendants an order of approval of the settlement and would ask the Court to enter that order of approval in accordance with the terms of the settlement as outlined by Mrs. Stover's testimony to the Court.

THE COURT: All right.

Well, now, I think I understand everything about this except for one thing. Let me ask you about it. It isn't too clear to me.

She understands she's only dismissing her own suit?

MR. COLLINS: Yes, sir.

THE COURT: She doesn't have any intention of dismissing the class suit that's now pending in the Supreme Court of the United States?

MR. COLLINS: Yes, sir, that is correct. To the extent that there is an individual action pending before the Supreme Court, that action would necessarily be dismissed as a part of this settlement as well as the individual action which is pending before this [57] court.

I think I could point out to the Court that I was not consulted nor was I specifically involved in the decision to file the application for writ of certiorari at the time that it was filed by the Williams and Connolly firm in Washington and I would expect, although they have not discussed this with me, that they would continue to pursue that application for writ of certiorari on behalf of the class even if the prior class representative had ultimately subsequently settled the claims and was no longer the class representative.

THE COURT: Well, she doesn't have an individual claim pending in the Supreme Court of the United States, does she? She's just a class representative.

MR. COLLINS: Yes, sir. Mr. Wolf—

THE COURT: What would she have to dismiss in the Supreme Court of the United States?

MR. COLLINS: I don't believe that individually there is an action pending before the Supreme Court that would be dismissed. I think that question was asked by Mr. Wolff and he indicated at that time that she had individual and as well as on behalf of the class an action pending in the Supreme [58] Court. I think Mrs. Stover understood that to mean that any individual action would be dismissed and, of course, that is the agreement that we have reached with the defendants that we are asking the Court to approve, that her individual actions be dismissed. However, she had even until September the 14th, when we were informed by Mr. Younger that he and Mr. Wolff had elected to reject her as class representative, had even offered at that point to continue.

THE COURT: That was a new class, though, wasn't it?

MR. COLLINS: Yes.

THE COURT: I'm not worried about the new class or anything like that, but does anybody have a different view of that, that she's got an individual claim pending in the Supreme Court of the United States that has to be dismissed before you can settle this case?

MR. WOLFF: Let me respond to that briefly, Your Honor.

First of all, the issues raised in the Supreme Court are the class issues. The issues are whether an interlocutory appeal of a certification of a mandatory class is appropriate, solely a class issue.

The second issue is whether a mandatory class as [59] certified by you violates the Anti-Injunction Act, again solely a class issue. But before you answer or after the answer I want to add a few things for the record so we will not have a mistaken record, or at least we will have both sides in the record.

THE COURT: Let them respond. Mr. Berkowitz.

MR. BERKOWITZ: I think the petition was brought on behalf of herself individually and on behalf of the class. I'm not sure what that means in terms of—you know, what it means in the Supreme Court. I think it's a requirement of the court that they be given notice that she has settled her claim.

THE COURT: Well, giving notice that she settled the claim is something different than saying you're going to file a motion to dismiss in the Supreme Court.

Does anybody have a copy of the petition for writ of certiorari? Is she appealing her own claim? What could she appeal? She doesn't appeal her own claim.

MR. WOLFF: Your Honor, several things. First of all, the caption is entitled that she is petitioner individually and as class rep because that is the caption from this court, and contrary to old form you don't change the names when you petition. The Court itself may restructure the caption but you don't [60] change the name and you maintain the same caption, but as I pointed out just a few seconds ago, the only two issues before the Supreme Court on certiorari are the class issues.

I may have slipped and my memory may have failed me, but to the best of my knowledge there is no rule in the rules of the Supreme Court that Mr. Berkowitz is talking about that you must notify the court of a settlement.

It is clear from Mr. Waldeck's questions, and I think it was clear to Your Honor because you asked the questions that I think brought the matter to a head, and that is, if there is a settlement of individual claims, the defendants will, as fast as they can get out of this courtroom, proceed to their offices and attempt to get the cert. petition dismissed as mooted by her settlement.

THE COURT: I'm not going to approve anything like that because I think that the issue before the Supreme Court ought

to be resolved. I'm not—any new class or anything like that or settling her individual claim, but anything to run to the Supreme Court and say this thing is mooted now, I'm not going to—I won't go along with that.

MR. WOLFF: May I address those points?

[61] THE COURT: All right.

MR. WOLFF: And address the settlement.

First, I don't want any bickering but I just want to make the record clear that Mr. Collins' statement of the conversations with Mr. Younger and what we said to him about Mrs. Stover continuing as class representative in a new class I believe is a mischaracterization, but whether he has the right characterization or I do I think is irrelevant.

With respect to the cert. petition, I believe that Mr. Collins' memory has failed him and it was a matter that was discussed and that he was sent a draft of a cert. petition and clearly he was sent several copies of the final cert. petition and, of course, at all times he has remained silent about any claim that this was filed contrary to her wishes or against her desires. I want to make that clear.

Let me address the point of the settlement and go down the various points.

It is with no enjoyment that we're here today, Your Honor. But we are here and we asked for this conference because 35 years ago the Supreme Court in Young v. Higbee decreed that a class representative, of a denied class, a class not yet certified, or an ongoing class has certain responsibilities beyond the [62] responsibilities of aggrandizing one's own settlement. And I put in the record because I think it is so important that the record reflect these duties.

The Supreme Court said that parties cannot avail themselves of the statutory privilege of litigating for the interests of a

class and then shake off their self-assumed responsibilities to others by a simple announcement that henceforth they will trade in the rights of others for their own aggrandizement.

Since the Supreme Court made that decision some 35 years ago, the other courts that have addressed this problem have looked at three questions, and I want to address each one in turn.

The three questions are, does the mere size of the settlement given the individual reflect collusion, collusion in the sense that there has been a selling of the class representative position.

2. Has the class representative breached fiduciary duties to class members?

3. Should this court order paid now or at some future date some amount of money of the fees recovered by counsel for the settling party to reimburse those individuals who pursued the class action or the consolidated litigation.

Let me address them one at a time. The question [63] of collusion.

As you know, Your Honor, through a letter dated September 17th, 1982, to protect the privacy of Mrs. Stover and the privacy of the defendants, we asked interrogatories and requests for production by letter form rather than a public pleading. Both Mr. Berkowitz, on behalf of the defendants, and Mr. Collins accepted this approach and replied in like form, Mr. Collins by letter of September 27th, Mr. Berkowitz by a letter of September 21st.

I ask that Your Honor in reaching a decision on settlement take these three letters as exhibits in this case and consider them as if they were pleadings on public file.

In those documents, the letter from us requested information about settlements and about settlement figures and about

other settlements to find out if there was an argument that the class representative role had been sold.

Both Mr. Collins and Mr. Berkowitz gave us only cursory information, saying that all other information requested was either privileged or work product. We believe it's neither. But we don't want to know more than we should know, but we do want the Court to know because this Court must make a decision whether or not [64] this settlement is fair or excessive.

I submit that on the basis of the information you now have you cannot make a determination whether this amount was on the button, within the range of reasonableness, excessive, or maybe, in light of other settlements, low.

We don't know what the present value of other offers are, of other settlements; we don't know what the guaranteed portions are.

I ask this, Your Honor, that you require Mr. Berkowitz and Mr. Collins to submit to you in camera the information called for by our request of September 17th, and then you and only you will have the information and then you will decide whether or not this settlement is the bargaining away of the class representative position because of the disparity between it and other settlements, or whether it's a fair and reasonable settlement that should be approved.

I don't care to know. But I think you should know and I ask that you require them to submit to you this information.

THE COURT: Let me ask you this, now. When I designated this class, Mrs. Stover submitted an affidavit and she said that she would see through the final resolution of this matter. Now, the final [65] resolution of this matter, that we were talking about, I'm not talking about any new class because I understand that. She doesn't want to serve and I don't blame her. But on the class we had, she said she would follow through this to the final resolution and that means it's in the lap of the

United States Supreme Court and it should be decided, and I'm not going to be a party to any settlement or authorizing any settlement that's going to—that the defendants are going to run up there and ask for this to be mooted out now that she's settled. That's just all there is to it.

If the defendants represent to me that they are not going to do that, I'll approve the settlement. If they represent to me that they are, then I'm going to consider the matter further.

MR. WOLFF: I would like to hear from them because depending on what they say, I have further response.

THE COURT: I would like to, too.

MR. DRISCOLL: Judge, Robert Driscoll on behalf of Crown Center and Hallmark.

Do I understand the Court to say that approval of this individual settlement of Mrs. Stover today is contingent upon whether or not the defendants make the statement to the Court you just now asked for?

[66] THE COURT: I'm asking you if that's what your intentions are, that you're going to use this settlement to try to get the hearing before the United States Supreme Court mooted, which you know that that is a legitimate issue that ought to be decided.

MR. DRISCOLL: Well, Your Honor, of course, all defendants aren't in this courtroom now and are not in any way involved in this settlement, for that matter, and can't be bound by anything that the lawyers here say or don't say.

THE COURT: I think you had better talk it over, then, because, look. You are in a—in a way, you are representing all the defendants because she's dismissing against every defendant that could possibly be held liable in this matter, not just your all's clients but everybody's.

MR. DRISCOLL: Well, in discussing with other defendants what the Court just said, I want to make sure that I do

understand. Is it the Court's position that this matter cannot be approved unless the defendants agree not to seek dismissal of the matter pending before the Supreme Court?

THE COURT: I think that's a fair statement.

MR. WALDECK: Your Honor, if I could respond as to part of the defendants that are represented here [67] today.

We have no present state of mind to do that or not to do it. In fact, to be perfectly candid with the Court, I haven't considered it either way. I have to confer with my associate counsel. If the Court is saying that the approval is conditional, as I understand you in response to Mr. Driscoll's statements, then I must go confer with my client because—

THE COURT: I understand that.

MR. WALDECK: But I want to make one thing clear. We come here today jointly asking for your approval of Mrs. Stover's personal injury claim and wrongful death claim in the sense that you and I as damage suit lawyers would think of as an individual claim. That was why the testimony was adduced in the manner that it is, so we asked for that.

The second phase I can neither say yea or nay to because I need to refer to my client. I'm troubled by the idea, as suggested by counsel, that we have run out and do that. We have no present state of mind to do either. I couldn't say yes or no to that.

MR. BERKOWITZ: As far as I know—

THE COURT: Well, what brought it up was no one told me that the case in the Supreme Court was even [68] remotely related to this settlement. But she testified that part of the agreement was that she would dismiss the case in the Supreme Court.

MR. WALDECK: The record adduced today, Your Honor, and I think in a fair reading of the record, either under Mr.

Wolff's examination or anyone else, is that Mrs. Stover comes here today understanding that as class representative she's settling her individual claim, and then we wanted to know what her understanding is. If she's going to settle something, this woman must do it knowingly and that's the purpose of the record so she can tell us she either heard that or didn't hear it.

MR. BERKOWITZ: It was not part of the agreement, Your Honor. You made the statement, it was not part of the agreement that she dismiss that petition. That wasn't her testimony and that wasn't the—any—there wasn't any such agreement.

MR. COLLINS: Your Honor, if I might clarify because I think that Mr. Wolff's questioning and the method by which he questioned led us to this problem.

I think Mrs. Stover could clarify it. If I misstate the facts of her understanding, if she will point out to the Court at this point, that there has been no agreement on her part to dismiss the [69] application for writ of certiorari pending before the Supreme Court as it relates to the class action certified by this court in January of 1982. She has agreed to dismiss individual actions that she may be pursuing, wherever they may be pursued, as opposed to class action questions.

Mr. Wolff's question concerning individually and as representative of the class in the Supreme Court is I think what causes the problem, not because he asked the question just because of the way we all heard it, and I do want the Court to understand that there is no agreement on behalf of this plaintiff or her children to dismiss any action pending before the Supreme Court or pending before this court relative to certification of a class action.

I would point out, however, that the Fifth Circuit Court of Appeals has reached this very issue on prior occasions. Application for cert. by the Supreme Court was denied in that

particular case wherein that court specifically held that giving away an application for a writ of certiorari was not a breach of a fiduciary relationship of the class representative to class members, and specifically in that instance the court approved the giving away or compromise of a pending application for writ of certiorari to the [70] Supreme Court concerning class action issues.

I do, however, want to make it very clear to the Court that there is no agreement nor are we asking the Court to approve dismissal of the application for writ of certiorari presently pending in the Supreme Court. We are simply asking for approval of the dismissal of individual claims of Shirley Stover and her adult children as those individual claims were originally filed in this court prior to the certification of the class action in January of this year, and it is those individual claims only that we are here to consider and it is only those.

THE COURT: I don't see how her individual claim could possibly be before the Supreme Court of the United States. There is no appeal on that. The whole thing was the class.

MR. COLLINS: It was the decision of the Eighth Circuit that was appealed concerning certification of the class action and I would ask Mrs. Stover now, have you made any agreement or do you intend to file a motion asking that that writ, that application for a writ of certiorari, be dismissed concerning the Eighth Circuit's decision relative to this court's certification of the class action?

MRS. STOVER: No.

[71] MR. WOLFF: That's fine, Your Honor. But let me deal with the more important problem. Mr. Collins says Mrs. Stover will not seek to dismiss her certification. That's fine. But what you heard from the defendant's side of the table I submit is sheer double-talk. They will not tell you whether they are going to or not going to do it. Without a commitment you can

rest assured that as soon as this settlement is completed, if you approve it, whether it's individual or class claims, they will be in the Supreme Court seeking to move to have it dismissed as moot.

In fact, a letter was sent from interveners to either Mr. Collins or somebody else, which we got a copy of, pointing out that they wanted to know whether the case was mooted in the Supreme Court by her settlement because they threw in a few threats that if you don't moot it now and we print our response to cert. petition you're stuck with our costs so it is clearly an issue. Both the interveners and the defendants will be in the Supreme Court pronto seeking to derail that cert. petition

Now, the case that Mr. Collins talks about, first of all, was overruled seven years after that by the Roper decision and then by the Supreme Court in the affirmance of Roper, but be that as it may, Mr. [72] Collins' case dealt with a cert. petition of a denial of an interlocutory appeal so any other class member could have gone back up to the court of appeals and then to the Supreme Court. There was no finality. We have been to the court of appeals, we have had a decision.

If this cert. petition is dismissed, no class member can ever raise the issue again, the issue of the propriety of your first class will be dead. It can never be revisited, whether there is a new class or whether a member of the old class seeks to do anything. I submit the following, Your Honor.

To test the mettle of the defendants and to find out whether or not they aren't bargaining for the death of the cert. petition in this settlement, let's do the following. Either get from them a commitment, not the speaking out of both sides of their mouths that we don't know what we're going to do and we have made no agreement, but get a commitment from them that they will not seek to moot the cert. petition and find out whether they are really settling individual claims or trying to kill the cert. petition, then we'll know what they really bar-

gained for. If they only bargained for Shirley Stover's individual claims, then they should be happy to allow the cert. petition to go forward.

[73] Secondly, before you approve this settlement, certify Jackson and Vrabel, or one of them, as class rep in a new class and allow them time to intervene in the Supreme Court and to have themselves added as named petitioners, and thus hold off the settlement until they have had the opportunity to intervene and let's find out if when they try to intervene, those two diverse plaintiffs, whether defendants will oppose that, because I submit the following.

If Shirley Stover is settling her individual claims, God bless her. If the defendants are using this as a gimmick or a device to kill the cert. petition, then it should be stopped and it should be stopped in this courtroom. And I ask you to take those actions with respect to the settlement but make sure that either people have an opportunity to intervene in the Supreme Court who have diversity, Jackson and Vrabel, or you get a commitment out of them.

THE COURT: Who is Jackson? Now, is that the—

MR. WOLFF: The lady from Utah.

THE COURT: Utah. All right.

MR. WOLFF: Vrabel is the man from Maryland.

I thing that's important because then we'll know what the defendants were bargaining for. Because a cert. petition raises major issues. Cert. may be [74] denied, I don't know. At least the opportunity should be given—the opportunity should be given to those people on whose behalf Shirley Stover brought an original class which was certified to find out whether they have a (b)(1) class or not.

THE COURT: To tell you the truth, this never entered my mind, that this would even come up.

I'm going to give the defendants an opportunity to discuss this with all the defendants and come back and make some representation to me about this.

I can't believe that they would—I tell you. This case is—the things that have gone on in this case just tear me up.

MR. BERKOWITZ: Judge—

MR. WALDECK: Judge, why do you presume we're going to do something? Don't do that.

THE COURT: I'm not.

MR. WALDECK: Don't make that representation.

MR. BERKOWITZ: Don't make the assumption that we even thought about it. That's not true. Don't make any assumption that we made a decision based on that.

THE COURT: All right. Well, how soon can you let me know? I hate to hold this settlement up.

MR. WALDECK: Just we'll do it in a matter of [75] days.

MR. DRISCOLL: The defendants again meet as a group tomorrow.

THE COURT: All right.

MR. COLLINS: Your Honor, if I might clarify. Mr. Wolff and Mr. Younger have both had ample opportunity to discuss this not only with myself but with the defendants and this is the first time this issue has been raised or has been brought to question.

I asked Mr. Wolff before the hearing began today what his intentions were and what he intended to raise to the court. I think it could have been discussed in a much less fervent atmoshpere than it has been presented to the Court.

There has never been any discussion in any of the settlement negotiations that have ever taken place between myself.

on behalf of the Stovers, and the defendants of an agreement to dismiss any action pertaining to the class action. Specifically, we never even discussed or agreed that in fact she would refuse to serve as class representative after approval of her settlement.

I contemplated at the time of the hearing of September 13th that Mr. Younger would inform you at that time that she did offer to continue to serve, but [76] that there were restrictions upon that because of her desire to have limited active involvement and, as a matter of fact, at a two o'clock telephone call on the 14th, the following day Mr. Younger suggested that at the hearing we had proposed for that Friday a proposed order certifying the new class be presented to the Court describing the limited involvement of Shirley Stover as class representative. Two hours later, at four o'clock, Mr. Younger called me back and made this information known to me that they no longer wanted Mrs. Stover and that is the point at which we had the conference call with the Court and Mr. Berkowitz where we postponed until today.

Mrs. Stover wants a settlement on behalf of herself and her children. Her doctors have indicated to her it's in her best interests to discontinue active involvement in the prosecution of these claims, and I believe very candidly that it is in her best interests and in her children's best interests to discontinue their involvement in the case.

THE COURT: Mr. Wolff, you understand that was the reason I didn't let them take her deposition.

MR. COLLINS: Yes, sir, I understand.

THE COURT: I wasn't going to let her go through that. They could find out what they wanted to [77] know in another manner.

MR. WOLFF: Your Honor, let me address this. There is several matters that must be separated out. First of all, let me focus on Mrs. Stover and Mr. Collins.

Mr. Collins said with respect to a new class, the issue is now before you in its beginning stages.

THE COURT: Mr. Wolff. You know, I don't want to interrupt, but if she was wanting to settle her case, I wouldn't have appointed her as a class representative anyhow.

MR. WOLFF: I agree. I agree. I say that's why we must—we must separate that out from the class she did represent to the Supreme Court.

THE COURT: That's what I'm talking about.

MR. WOLFF: I'm saying they are two totally separate things. The matter was raised by Mr. Younger to Mr. Collins. Where do we stand on her in the Supreme Court? Mr. Collins said, we will decide that after the settlement is approved. That's why—

MR. COLLINS: I object, Your Honor—

MR. WOLFF: Let me finish.

MR. COLLINS: —to Mr. Wolff making any representations concerning conversations between myself and Mr. Younger. Mr. Wolff wasn't a party to those, [78] unless he listened unbeknownst to me, or heard a recording that was made unbeknownst to me, and I would hate for him to misrepresent to the Court, then I'm going to have to stand up and tell the Court what I understood the conversation to be is not productive.

THE COURT: Let's don't get bogged down.

MR. WOLFF: The point of the matter is we asked for this conference because we were uncertain as to what would happen with the matter in the Supreme Court and it was clear to us, from the letter and what was going on at the interveners and the defendants and our knowledge, which we think as litigators of what someone would do.

THE COURT: What was the letter from the interveners?

MR. WOLFF: The interveners sent out a letter, which we got a copy, wanting to know if Mrs. Stover considered her case in the Supreme Court mooted, and if they did they wanted to be informed that she was going to dismiss it so they could save the costs of printing their brief.

Then they said, if you desire to continue we call to your attention that you will be held responsible for costs, and then unbeknownst to us we got a copy of it, but it's clear from that and from any logical analysis [79] of what is going on that if this settlement is approved they will seek to moot the cert. petition, and I say, Your Honor, if this is only the settlement of the Stover claims then Mr. Berkowitz should be able to say, we're only settling the individual claims and we commit to you, we will allow the cert. petition to go forward.

THE COURT: They are going to talk to their people and come up with that.

MR. WOLFF: Can I ask you another thing?

THE COURT: All right.

MR. WOLFF: I ask you before you approve the settlement you pass on the Vrabel and Jackson petitions so that if they are certified they can move to intervene to give Belton Suspenders protection to the cert. petition so we can have people attempt to intervene in the Supreme Court on behalf of the class.

THE COURT: If you tell me—if they come back and tell me that they are going to try to get the case mooted up there because Shirley Stover settled her individual claim, I will—if a motion is filed, I'll consider that before I approve the settlement.

MR. WOLFF: I'm sorry. Would you repeat that, please? If the motion is filed.

THE COURT: If they indicate that—the defendants indicate to me that their intention is to [80] use this settlement to

moot the matter now pending before the Supreme Court of the United States, this settlement, then I will give the—I will consider a motion to certify the Jackson and Vrabel to intervene as class representatives and to substitute her and then I can settle her claim.

MR. WOLFF: Because I want to make it clear, my last point, and that is that I do not take issue at the present time with Mr. Collins' statement. He has now said that she will continue to pursue the cert. petition. And I say that is fine, we welcome that. And that she will not withdraw. What I don't welcome is what they may do on the other side.

THE COURT: I want to let Mrs. Stover settle her claim. She's a lovely lady and she's been through too much already and I don't want her to get bogged down in all this business.

MR. WOLFF: Nobody agrees with you more than I, Your Honor, that if it is a settlement only of the Stover family claims it should be done forthwith, and she should be allowed her piece and quiet. But if there is any ploy in this to damage the interests of those who are represented by her in the cert. petition, Your Honor should bring that to a halt and not allow the defendants to do it. That is why I think it is [81] important that you require them to come before you and make the representation you requested. If they don't make that representation, that you immediately act on the Jackson and Vrabel matter and allow them the opportunity to seek intervention before you pass on the settlement. If we had those assurances from the defendant today, we could move forward.

THE COURT: Well, they need to talk to these other people and I can understand that.

MR. WOLFF: Can I move to the last matter? The last matter, in approving this, you must deal with is the question of fees and costs. If you will read the exhibit offered by Mr. Collins, the July 1st letter from me, you will see that that letter

addresses what would happen if this case met without success and no money was recovered, either from judgment or settlement, to pay fees and expenses. It said he would look to his clients, we would look to our clients. It did not address the issue and we have never addressed the issue of what would happen if there was success either in whole or in part and money was brought into this case as a result of the work in the federal action.

Now, the cases are legion in the district courts in both class actions and consolidated actions. When

* * * * *

[98] compelled, by the Florida case or any other case, to apportion any part of this settlement to Mr. Wolff or anyone else.

Secondly, that a material portion of this settlement agreement between the Stovers and the defendants concerns the payment of attorneys' fees and expenses and that absent the agreement as to the attorneys' fees and expenses there is no settlement, and, therefore, I would ask the Court to approve the settlement as it has been presented today, to approve the amount as reasonable and fair under the circumstances, to approve the payment of attorneys' fees and expenses, and I continue to represent to the Court at the time when class certification is finalized or when a class action is finally approved by the Supreme Court and application is made for attorneys' fees and expenses, I will be happy to present to the Court a determination of what my attorneys' fees or expenses might have been and ask the Court to include that in the monies to be apportioned among the class counsel who take the case to trial or who at that point settle the case.

THE COURT: Well, now, some of the expenses that you have charged against Mrs. Stover, were some of those expenses incurred in your participation in the [99] class?

MR. COLLINS: No, sir. No, sir. There has been a separation of expenses in my office as to those relative to the class and those relative to Mrs. Stover individually and she will only pay out of the recovery from this settlement those that are relative to her individually. Those that I have otherwise, I will not recover and make no claim for.

THE COURT: All right. Well, it won't be necessary for Mrs. Stover to come back, and pending notification from the defendants, why, I won't approve the settlement today, but as soon as I get that, why, I will. I don't have any reservations about the adequacy of the settlement and I don't have any reservation about it being in any way improper, too much, too little or anything like that.

I take it, from what you all told me, you will be getting word to me by tomorrow evening?

MR. WALDECK: Yes.

MR. DRISCOLL: We have a regularly scheduled meeting tomorrow morning with all defendants. Whether they will all be there, I don't know.

THE COURT: Just let me know as soon as you can. I may be gone tomorrow afternoon because I have to go down to Jefferson City and swear in the new [100] lawyers but I will be back here then Tuesday afternoon.

MR. DRISCOLL: We'll get it to you prior to then.

THE COURT: All right.

Is there anything else?

MR. WALDECK: Nothing, Your Honor.

MR. BERKOWITZ: Nothing.

THE COURT: Mrs. Stover, it's nice to have met you and I wish you the very best.

MRS. STOVER: Thank you very much.

THE COURT: Okay. We'll be in recess.

[Adjournment.]

[101] **CERTIFICATE**

I, Lee W. Sharp, Registered Professional Reporter, do hereby certify that I am a duly appointed, qualified and acting Official Court Reporter for the United States District Court for the Western District of Missouri; that the foregoing pages contain a true and correct transcript of the proceedings had in the within-entitled cause on the date stated therein, and that said transcript is a true transcription of my shorthand notes taken therein.

_____RPR, CM

Official Court Reporter